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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
and
FLOYD N. LEMMONS,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court
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Eastern Division.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on June 4, 1962, in *Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons* v. *United States of America and Interstate Commerce Commission,* Civil No. 61 C 1706, dismissing plain-

tiffs' complaint brought to set aside an order of the Interstate Commerce Commission requiring appellants to cancel certain joint motor-rail rate schedules. Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

The District Court did not render an opinion, but entered findings of fact and conclusions of law. These findings and conclusions, not yet reported, are set forth as Appendix A, page 1a, *infra*. The report of the Interstate Commerce Commission in *Bituminous Coal Via Motor-Rail—Lynnville, Indiana to Chicago, Illinois,* is reproduced as Appendix C, page 12a, *infra*.

JURISDICTION.

This action was brought under 49 U.S.C. § 17 (9) and 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission. The judgment of the three-judge District Court (Appendix B, page 11a, *infra*) was entered on June 4, 1962, and notice of appeal was filed in that court on June 29, 1962. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions, among others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Florida East Coast Ry.* v. *United States,* 234 U.S. 167; *United States* v. *Chicago, M., St. P. & Pac. R.R.,* 294 U.S. 499; *American Trucking Assns.* v. *United States,* 364 U.S. 1; *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567.

STATUTES INVOLVED.

1. The National Transportation Policy, 54 Stat. 889, 49 U.S.C. preceding §§ 1, 301, 901, and 1001: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

2. Section 15a(3) of the Interstate Commerce Act, 72 Stat. 572, 49 U.S.C. § 15a(3): "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable."

Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

3. Second Proviso to Section 206(a)(1) of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. § 306(a)(1): "*And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

4. Section 216(c) of the Interstate Commerce Act, 49 Stat. 558, 49 U.S.C. § 316(c): "Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad and/or express and/or water. . ."

5. Section 216(e) of the Interstate Commerce Act, 49 Stat. 558, 49 U.S.C. § 316(e): ". . . Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or

water for transportation in interstate or foreign commerce . . . is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, ..."

6. Section 217(a) of the Interstate Commerce Act, 49 Stat. 560, 49 U.S.C. § 317(a): "Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. . ."

QUESTIONS PRESENTED.

1. Is an order of the Interstate Commerce Commission valid if it is founded only on the National Transportation Policy, without reference to, or basis in, any substantive provision of law?

2. Did the Commission exceed its statutory authority in ordering cancelled a joint motor-rail rate which Congress had authorized?

3. Is Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)) relating to intermodal competition, applicable to competition between rail carriage and joint motor-rail carriage?

4. If the answer to question 3 is in the affirmative, must not the Commission make the findings required by Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3))?

5. If the answer to question 3 is in the negative, must not the Commission make a finding with respect thereto when the issue is raised in a proceeding involving competition between rail carriage and joint motor-rail carriage,

6. May the Commission, in the absence of cost evidence or unfavorable rate comparisons, require the cancellation of a proposed joint motor-rail rate in competition with all-rail rates, on the grounds that it constitutes a destructive competitive practice and is unjust and unreasonable?

7. May the Commission, and the District Court, disregard, and fail to make findings concerning, evidence of extensive and costly operating difficulties over all-rail routes which compete with a proposed motor-rail route?

8. Did the Commission, by administrative fiat, unlawfully restrict the applicability and scope of the Second Proviso to Section 206 (a)(1) of the Interstate Commerce Act (49 USC § 306(a)(1)) relating to motor transportation in interstate commerce over routes wholly within a single state?

9. Is the Commission empowered to require cancellation of joint motor-rail rates without determining and prescribing the lawful rate, or the maximum or minimum, or the maximum and minimum, rate or rates thereafter to be observed?

10. Did the Commission deny the Defendants (Plaintiffs-Appellants herein) a full and fair hearing in violation of the due process clause of the Fifth Amendment of the Constitution of the United States, the Administrative Procedure Act, and its own General Rules of Practice?

11. Is the Commission's order supported by adequate and requisite findings of fact having a rational basis?

12. Are the Commission's order and findings supported by substantial evidence of record?

13. Did the District Court err in failing and refusing to enjoin, annul, and set aside the order of the Commission in Investigation and Suspension Docket No. 7424, *Bituminous Coal Via Motor-Rail—Lynnville, Indiana to Chicago, Illinois?*

STATEMENT OF THE CASE.

The proceeding before the Commission involved the lawfulness of appellants' initial through single-factor motor-rail rate on bituminous coal from Lynnville, Indiana to Chicago, Illinois, via Haubstadt, Indiana. The coal mine at Lynnville is served by the New York Central Railroad Company (hereinafter referred to as "Central") and the Southern Railroad Company (hereinafter referred to as "Southern"). The Central has a line of railroad between Lynnville and Chicago, and appellant Chicago & Eastern Illinois Railroad Company (sometimes hereinafter referred to as "C&EI"), has a line of railroad between Evansville, Indiana and Chicago through Haubstadt, approximately 16 miles from Lynnville. The C&EI connects with the Southern at Evansville, Indiana, and has a joint rate with the Southern for the transportation of coal from Lynnville to Chicago. The published rate of $3.00

per ton over appellants' motor route to Haubstadt, thence via rail to Chicago, was identical to the rate of the Central and the joint rate of the Southern and the C&EI.

The rate as filed was protested by six railroads, including the Southern, and the Commission suspended the rate.

At the hearing on the lawfulness of the proposed rate the protestant railroads, although they had the burden of proof, since this was an initial rate (Report of Division 2, Appendix C hereto, page 14a), introduced no evidence other than general testimony to the effect that they were opposed to the joint motor-rail rate because it might lead to the spread of joint motor-rail rates to other coal mines. Appellants' evidence was to the effect, *inter alia*, that their proposed motor-rail route is the low-cost, more efficient mode of transportation. Division 2, by a vote of two to one, found that the proposed rate constituted a destructive competitive practice, and was unjust and unreasonable. The finding of Division 2 in support of such conclusion reads as follows:

> "If the railroads were forced by competition to enter into joint motor-rail rates, thus increasing their transportation costs, with reductions in their revenues for this important segment of traffic, the results could be unnecessary dissipation of carrier revenues and serious disturbance of a just and reasonable rate adjustment, in contravention of the national transportation policy."

The Commission made no reference to the issues raised by appellants, including those arising under Sections 15a(3) and 206(a)(1) of the Interstate Commerce Act.

In the District Court action, defendant United States filed a neutral answer, in which it stated that it neither supported nor opposed the Commission's order. The Com-

mission's order was defended by Commission counsel and counsel for the protesting railroads, which had intervened in the case.

The District Court adopted the findings and conclusions proposed by counsel for the Commission, and dismissed the complaint.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents novel questions concerning, *inter alia*, the power of the Commission to issue an order grounded only in the national transportation policy, without any reference to, or basis in, any provision of substantive law; the power of the Commission to thwart Congressional policy favoring the establishment of joint-motor-rail rates; the powers and duties of the Commission in a rate proceeding involving carriers of different modes of transportation; and the power of the Commission to restrict, in a rate proceeding, authority unqualifiedly granted by Congress to motor carriers engaged in interstate commerce over routes wholly within a single state.

I.

Question No. 1, *ante*, page 5, raises the issue whether the Commission can base an order solely on a provision of the national transportation policy. This policy, set out as footnotes following 49 U.S.C., Sections 1, 301, 901 and 1001, declares it to be the national transportation policy of the Congress "to provide for fair and impartial regulation of all modes of transportation . . . so administered . . . as to recognize and preserve the inherent advantages of each; to promote . . . economical and efficient service . . ., [and] to encourage the establishment and maintenance of reasonable charges for transportation services,

without . . . unfair or destructive competitive practices . . .” This declaration of policy is not a provision of substantive law, but is merely a rule of construction to be applied in resolving questions arising under the Interstate Commerce Act. *New York, New Haven & Hartford Railroad Company* v. *United States*, 199 F. Supp. 635 (D. Conn., 1961); *Cotton From Memphis and Helena to New Orleans*, 273 ICC 337, 367. The national transportation policy cannot be emphasized “to the detriment of the directive it merely qualifies” *Missouri Pacific Railroad Company* v. *United States*, 203 F. Supp. 629, 634 (E.D. Mo., E.D., 1962). Nevertheless, the Commission in the instant case applied the national transportation policy as a provision of substantive law. In its finding, quoted *ante*, at page 8, Division 2 stated that if the railroads were forced by competition to enter into joint motor-rail rates, the results could be in contravention of the national transportation policy; that therefore the proposed schedules constitute a destructive competitive practice and are unjust and unreasonable. At no point in its report does the Commission refer to any substantive provision of law, nor could it properly do so, since there are no subordinate findings, and no evidence, relating to any such substantive provision. The subordinate findings relate only to alleged “destructive competitive practices”, as used in the national transportation policy.

Moreover, the Commission unlawfully confined its consideration of the national transportation policy to the provision dealing with “destructive competitive practices”, and failed to consider the provisions dealing with the promotion of economical and efficient service, or the preservation of the inherent advantages of each mode of transportation. Cf. *New York, New Haven & Hartford Railroad Co.* v. *United States, supra*; *Missouri Pacific Railroad Co.*

v. *United States, supra*; *St. Louis-San Francisco Railway Co.* v. *United States*, ... F. Supp. ..... (Civil No. 61 C 309 (1), E.D. Mo. ED., 1962, Civil No. 61 C 309(1), not yet printed). Unrebutted evidence of record shows that the motor-rail route of appellants is the low cost, more efficient route.

II.

Question No. 2, *ante*, page 5, is directed at the action of the Commission in ordering a joint motor-rail rate cancelled in the face of a Congressional policy that establishment of such rates be encouraged. The Commission ordered the rate cancelled because "competition" from such rate "might" force the railroads to enter into joint motor-rail rates, with results that "could be in contravention of the national transportation policy". Division 2 thereby nullified a Congressional policy so clearly and succinctly expressed in the brief of the United States in *United States* v. *Association of American Railroads*, 36 F. Supp. 225, (Dist. of Col., 1940), an anti-trust suit against the railroads based on concerted refusal to enter into joint rates with motor carriers. (A consent decree was entered in the United States District Court for the District of Columbia in Civil Action No. 4551, CCH Trade Regulation Reports, 9th Edition, paragraphs 52, 631). The brief of the United States stated:

> **"In the declaration of policy contained in Section 202(a) of the Motor Carrier Act, Congress declared that co-ordination between motor carriers and other carriers was one of the fundamental policies of the Act, and it provided in Section 216(c) of the Act that common carriers of property and passengers by motor vehicle 'may establish reasonable through routes and joint rates with common carriers by railroad.'"**

The Commission's action raises the further substantial question whether the Commission may, by administrative fiat, restrict the applicability and scope of the second proviso to Section 206(a)(1) of the Interstate Commerce Act, (49 U.S.C. Section 306(a)(1)) (See Question 8, *ante*, page 6). Under said proviso, a motor carrier holding intrastate authority, upon filing evidence of such authority with the Interstate Commerce Commission, may engage in interstate commerce over routes wholly within a single state in the transportation of commodities authorized by the state regulatory body. Appellant Lemmons has filed with the Interstate Commerce Commission evidence of such intrastate authority with respect to the transportation of coal.

The proposed joint motor-rail rate was published pursuant to Section 216(c) of the Interstate Commerce Act, *ante*, page 4. Sections 6(1) and 217(a) of the Interstate Commerce Act (49 U.S.C., Sections 6(1) and 317(a)) deal with the publication of railroad rates and motor carrier rates, respectively. Section 6(1) permits the railroads to publish separately established rates over through routes with other railroads (Cf. *Thompson* v. *United States*, 343 U.S. 549) but Section 217(a) requires, without qualification, publication of *joint rates* in connection with through routes established by motor carriers with other motor carriers or with any railroad. Co-ordinated motor-rail service "[can] only be accomplished through the medium of through routes and joint rates. . ." *Kansas City S. Transport, Inc. Common Carrier Application*, 10 M.C.C. 221, 235-236; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 71 (fn. 7). See also ICC Circular No. 20, Supp. 4, Rule 31, prohibiting the railroads from filing proportional rates in connection with through routes with motor carriers, and requiring "in accordance with the

provisions of Section 216(c)" the filing of *joint* rates on any through routes established with motor carriers. Since appellant Lemmons cannot publish proportional rates in connection with through routes with railroads, and since the Commission's order in effect prohibits him from entering into joint rates with railroads on coal traffic, he is precluded, contrary to the authorization contained in the second proviso to Section 206(a)(1), from engaging in interstate commerce on coal over routes wholly within the State of Indiana.

III.

Questions 3, 4, 5, and 6, *ante*, pages 5, 6, present the issue whether the Commission, in a proceeding involving competition between a motor-rail route and all-rail routes, may ignore, and fail to make reference to or findings under, Section 15a(3) of the Interstate Commerce Act (49 U.S.C. Section 15a(3)). Said section requires the Commission, in determining whether a rate is lower than a reasonable minimum rate in a proceeding involving competition between carriers of different modes of transportation, to consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable; and prohibits the Commission from holding up the rates of a carrier to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy. Joint motor-rail transportation is a separate and distinct mode of transportation. *New York, New Haven & Hartford Railroad Co.* v. *United States*, 199 F. Supp. 635 (D. Conn., 1961), is authority for the proposition that box-car, rail-highway-rail (trailer-on-flat-car), motor-water, rail-water, and rail-water-rail are all separate and distinct modes of transportation. In or-

dering cancelled the proposed joint motor-rail rate, the Commission in effect is holding up the proposed rate to a level designed to protect the traffic of protestant Central, and to a level sufficiently high that railroads generally would refrain from entering into joint motor-rail rates to meet competition from the proposed rate. Yet the Commission made none of the findings required by Section 15a(3). It ignored in its findings the facts and circumstances attending the movement of the traffic over the motor-rail route, although persuasive and unrebutted evidence that such route is the low cost, more efficient route was of record.

Further, the Commission, in giving consideration to the objectives of the national transportation policy, failed to consider all pertinent provisions thereof. *New York, New Haven & Hartford Railroad Co.* v. *United States,* 199 F. Supp. 635 (D. Conn., 1961); *Missouri Pacific Railroad Co.* v. *United States,* 203 F. Supp. 629 (E.D., Missouri, E.D., 1962); *St. Louis-San Francisco Railway Co.* v. *United States,* ..... F. Supp. ..... (E.D., Missouri, E.D., 1962, Civil No. 61 C 309 (1), not yet reported). The Commission here completely ignored the requirement of the national transportation policy that the Interstate Commerce Act be so administered as to "recognize and preserve the inherent advantages of each mode" of transportation. *Interstate Commerce Commission* v. *Mechling,* 330 ICC 567; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56, 60-61. The Commission's habitual failure to observe such admonition motivated the enactment of Section 15a(3). H. Rpt. No. 1922, 85th Cong., 2nd Sess. (1958); *New York, New Haven & Hartford Railroad Company* v. *United States, supra,* at page 642. Under Section 15a(3) the Commission must give effect to the "inherent advantage" rule and must approve a rate proposed by the low cost

mode, unless such rate is so low as to harm the proponent thereof. *New York, New Haven & Hartford Railroad Co.* v. *United States, supra; Missouri Pacific Railroad Co.* v. *United States, supra; Pennsylvania Railroad Co.* v. *United States,* 202 F. Supp. 584 (E.D. Pennsylvania, 1962) *St. Louis-San Francisco Railway Co.* v. *United States, supra.* Appellants introduced uncontroverted evidence that the motor-rail route is the low cost, more efficient mode, while protesting railroads, who had the burden of proof on this point (*New York, New Haven & Hartford Railroad Co.* v. *United States, supra,* at page 646; *Missouri Pacific Railroad Co.* v. *United States, supra,* at page 635), introduced no evidence, and the Commission made no findings, with respect thereto.

IV.

Questions 6 and 7, *ante,* page 6, raise the further issue whether the Commission may, under any circumstances, condemn a rate as unreasonably low, without first finding that it is non-compensatory. The Commission, of course, made no such finding, nor could it have done so; the proposed rate is identical to the all-rail rate, the protestant railroads failed to introduce any cost or rate evidence, and appellants presented evidence that the joint motor-rail route is the low-cost, more efficient route. See *St. Louis-San Francisco Railway Company* v. *United States, supra:* "Since the rates involved were found to be compensatory, there is no evidence to support a conclusion of unfair or destructive competitive practices as such."

V.

Another substantial question is whether the Commission may predicate its order cancelling a published rate solely on its speculative conclusions that joint motor-rail rates *might* spread to other mines (Question 11). Cf.

United States v. *Chicago, Milwaukee, St. Paul & Pacific Railroad*, 294 U.S. 499, 507-510. Under the Administrative Procedure Act (5 U. S. C. Section 1001 *et seq.*) administrative agencies may not act on "surmise or speculation or untenable inference" (Sen. Doc. 248, 79th Congress, page 365).

There is the further substantial question whether the Commission is empowered to require cancellation of an initial joint motor-rail rate without determining and prescribing the lawful rate or the lawful minimum rate. The source of the Commission's power over joint motor-rail rates is found in Section 216(e) of the Interstate Commerce Act. Unlike Sections 15 and 307(b), which provide that the Commission, upon finding a rail rate or water carrier rate unlawful, *may* prescribe the lawful rate or lawful minimum rate, Section 216(e) provides that the Commission, upon finding motor carrier rates or joint motor-rail or motor-water carrier rates unlawful, *shall* prescribe the lawful rate or lawful minimum rate. In the only ruling it has ever made on this point, the Commission held that it is required by Section 216(e) to determine and prescribe the minimum reasonable rates to be observed. *Oil Field Haulers Association* v. *Acton*, 53 M.C.C. 507, 508. The Commission in effect has prohibited appellants from entering into a joint motor-rail rate on the involved traffic.

VI.

Division 2 found that it has long been the practice of mines to bear the burden of transporting their coal to the railroads. (Appendix C, Page 16a) The railroads have been enjoined, under the Sherman Act, from concertedly refusing to enter into cooperative arrangements with motor carriers. *United States* v. *Association of American*

Railroads, D. Dist. of Col., 1941, C. C. H. Trade Reg. Rpts., paragraphs 52 and 631. Evidence of record indicates the continued existence of such concerted refusal. A serious question arises as to the propriety of supporting ultimate findings with a subordinate finding as to a practice that violates Federal law.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are so substantial and are of such public importance as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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PROOF OF SERVICE.

I, Frank F. Vesper, one of the attorneys for appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of August, 1962 I served the foregoing jurisdictional statement on each adverse party in the following manner:

1. On appellee United States by mailing copies thereof, in a duly addressed envelope with air mail postage prepaid, to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C.; and in a duly addressed envelope, with first-class postage prepaid, to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450, United States Court House, Chicago, Illinois.

2. On appellee Interstate Commerce Commission by mailing copies thereof in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, its General Counsel, and Fritz Kahn, its Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On appellees The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and the New York, Chicago and St. Louis Railroad Company, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, Richard J. Murphy, Esq., and

Jack Rand, Esq., New York Central System, 1225 LaSalle Street Station, Chicago 5, Illinois.

.....

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APPENDIX A—Findings and Conclusions.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and FLOYD N. LEMMONS, *Plaintiffs,* v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 61-C-1706

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action to enjoin, annul and set aside orders of the defendant, Interstate Commerce Commission, having come on for hearing on May 2, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. §2284, upon the plaintiffs' complaint and the defendants' answers thereto, and the Court having received in evidence a certified copy of the record of the proceedings before the Commission; now, after reviewing said record in its entirety and hearing oral arguments of counsel for the respective parties and after consideration of said arguments and the written briefs of counsel, the Court makes and enters the following findings of fact and conclusions of law:

Findings of Fact

1. By schedules filed with the defendant, Interstate Commerce Commission, and published to become effective on September 1, 1960, the plaintiffs, Chicago & Eastern Illinois Railroad Company, a common carrier railroad, hereinafter referred to as C&EI, subject to regulation under Part I of the Interstate Commerce Act, 49 U.S.C.

§1 *et seq.*, and Floyd N. Lemmons, a common carrier by motor vehicle, hereinafter referred to as Lemmons, subject to regulation under Part II of the Interstate Commerce Act, 49 U.S.C. §301 *et seq.*, proposed to establish a joint motor-rail rate of $3 per ton, minimum 1,000 tons, on bituminous coal from Lynnville, Indiana, to Chicago, Illinois, and points within the Chicago switching limits.

2. The intervening defendants, The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and The New York, Chicago and St. Louis Railroad Company, duly protested the filing of the proposed rate with the Commission.

3. Operation of the proposed rate was ordered suspended to and including March 31, 1961, by order of the Commission entered August 29, 1960, by which the Commission instituted an investigation into the lawfulness of the proposed rate, docketed as Investigation and Suspension Docket No. 7424, Bituminous Coal Via Motor-Rail From Lynnville, Ind., to Chicago, Ill.

4. The investigation proceeding not having been concluded at the expiration of the period of suspension, the plaintiffs voluntarily postponed the effective date to and including May 15, 1961, when the rate, as increased to $3.07, went into effect.

5. Hearing was had before an examiner of the Commission at Chicago on December 14, 1960, at which testimony and exhibits were received in evidence.

6. The parties filed briefs on January 30, 1961.

7. On April 28, 1961, the Commission, Division 2, entered its report and order in which it found the proposed rate to be unjust and unreasonable and to constitute a destructive competitive practice. 313 I.C.C. 573.

8. In addition to its ultimate finding above, the Commission found that:

A. Lynnville, the origin from which the rate at issue was published, is located in the Princeton Group of the midwest mine field located in the States of Illinois, Indiana, and Kentucky.

B. The rates applicable from the said mine field to Chicago are on a group and differential basis as prescribed in Fine Coal From Midwestern Mines to Chicago, 298 I.C.C. 37 (1956), as modified in Coal From Illinois, Indiana, and Kentucky to Illinois and Indiana, 308 I.C.C. 673 (1959). The rates from different origins within a single group are identical and the rates applying from origins in any group are differentially related in a fixed amount of cents per net ton to the rates applicable from origins in any other origin group.

C. The rates embodied in the midwestern rate structure apply on coal loaded in cars, the shipper bearing the cost of transportation from its mine to the railroad, which practice tends to encourage a mine to transport its coal to the nearest railroad.

D. In addition to performing the rail line-haul movement to Chicago, plaintiffs would undertake the truck transportation of the coal from the mine at Lynnville to the C&EI railhead at Haubstadt, Indiana, and its transfer from truck to rail car through the facility there built for this purpose. The undertaking of additional services not presently performed at the same group rates would increase the cost of rendering the service and reduce the rail revenues.

E. Chicago is an important market for midwestern coal, having received during 1959 approximately six million tons. Likewise, coal is an extremely important commodity to protestants. During the year 1959 the six protestants handled almost 200,000,000 tons of coal. Coal traffic constitutes approximately 38.9 percent of the New York Central's tonnage, and approximately 18.7 percent of its revenue. Specifically, the coal originating at Lynnville is important to the Central as illustrated by the fact that during the first ten months of 1960 the Central originated 1,315,000 tons of coal at that location.

F. Should the assailed rates be permitted to become effective, the New York Central would reduce its rate to prevent loss of traffic.

G. Similar joint motor-rail arrangements could be expected to be published by other railroads in conjunction with Lemmons or some other motor carrier. Such practices would cause railroads to absorb most or all of the cost of transporting the coal from the mine to the railroad. Additionally, to avoid unlawful discrimination, like arrangements would probably be required from numerous off-rail mines.

H. The cross-hauling of coal by motor carriers to facilities of competing railroads would entail services at the same group rates which services are not presently performed. The divisions to the motor carriers of such joint rates would reduce the rail revenues and increase the cost of rendering the service.

I. Coal is a relatively low-priced heavy-loading commodity. The rail rates thereon are generally maintained at a low level in relation to the cost of performing the service.

J. If railroads were forced by competition to enter into joint motor-rail rates with increased transportation costs and reduced revenues on their important coal traffic, the results could be the unnecessary dissipation of their revenues and a serious disturbance to the just and reasonable rate structure in contravention of the National Transportation Policy.

9. The Commission concluded that the plaintiff's schedules naming the proposed rate constitute a destructive competitive practice and are unjust and unreasonable, and ordered the schedules cancelled.

10. The plaintiffs, on June 5, 1961, petitioned the Commission for reconsideration of its report and order, and on August 31, 1961, their petition was denied.

11. The instant suit was brought on October 10, 1961, on which date, this Court, the Honorable Michael L. Igoe,

entered a temporary restraining order, which, by stipulation of the parties, has been continued in effect pendente lite.

12. While many grounds for the Court's holding invalid the order of the Commission have been urged by plaintiffs, which grounds were replied to by defendant and intervenors (hereinafter collectively referred to as defendants), the basic disagreement among the parties arises from the approach taken by the Commission in deciding the case. Plaintiffs assert that the Commission should have considered the assailed rate independently of the midwestern rate structure, while the defendants state that the Commission correctly considered that rate in terms of the rate structure of which it would become a part. In argument before this Court plaintiffs asserted that the Central could lawfully reduce its rate to a level covering the out-of-pocket cost of performing the service, and that reductions of other rail rates should be denied by the Commission only if such reduced rates fail to cover out-of-pocket costs. Defendants state in reply that the Commission had the power to protect the prescribed just and reasonable midwestern coal rate structure from the attack of a singly rail carrier by preventing the initial act which would lead to its impairment and to the consequent substantial reduction in rail revenues.

13. Plaintiffs claim support for their contention in section 15a(3) of the Interstate Commerce Act, 49 U.S.C. §15a(3), which provides:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national

> transportation policy declared in this Act. [Emphasis added.]

Defendants reply by pointing out that, while a motor carrier is a party to the assailed rate, the service performed thereunder is essentially rail and is no different than the service performed at numerous off-rail mines in the midwestern mine field. Since Section 15a(3) of the Act by its terms applies only to inter-modal competition, they say, the Commission retains power to protect a rail rate structure from the assult of a single railroad even though a motor carrier may be the instrumentality employed by such a railroad to compete. Further, defendants state that since Section 15a(3) of the Act makes reference to the National Transportation Policy, that policy should be considered in its construction. The National Transportation Policy declares it to be the policy of Congress inter alia

> to encourage the establishment and maintenance of reasonable charges for transportation services, without . . . destructive competitive practices . . .

Thus, defendants argue that, even if Section 15a(3) were applicable, it must be construed, as specifically required by its terms, in accordance with the National Transportation Policy forbidding destructive competitive practices and that the destruction of an adjudged reasonable coal rate structure for the temporary gain of a single railroad, party to that structure, constitutes such a practice.

14. Plaintiffs also contend that the Commission was powerless to order the assailed rate cancelled without simultaneously prescribing a just and reasonable rate for the future. This argument is based on Section 216(e) of the Interstate Commerce Act, 49 U.S.C. §316(e), which provides that in proceedings arising by complaint or by investigation upon the initiative of the Commission, when the Commission finds a rate to be unlawful "it shall determine and prescribe the lawful rate . . ." Defendants point out, however, that this proceeding arose under 216(g) of the Act, 49 U.S.C. §316(g), which deals with

the investigation and suspension of new rates. That section, in effect, provides that, in a proceeding arising thereunder, the Commission may enter an order as would be proper in a proceeding arising under Section 216(e). Defendants point out that the language in Section 216(g) is permissive and that it is customary for the Commission in a proceeding arising under that section to order rates cancelled without prescribing rates for the future. They cite Malone Freight Lines v. United States, 159 F. Supp. 952 (N.D. Ala. 1957), a case decided by a statutory three-judge court and upholding the Commission's right to order cancellation of as unlawful rate under 216(g).

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter in this case, 28 U.S.C. §§1336, 1398, 2284, and 2321-2325; Midwest Emery Freight System, Inc. v. United States, 202 F. Supp. 229 (N.D. Ill. 1961).

2. The task of this Court in reviewing the assailed actions of the Commission is limited and well-defined. If the orders complained of lie within the scope of the statute which the Commission is empowered to administer and enforce and are based upon substantial evidence, this Court may not set them aside or modify them, even though it may have decided otherwise originally and even though the orders may be against the weight of the evidence. 5 U.S.C. §1009(e); Illinois Cent. R. Co. v. United States, 101 F. Supp. 317, 327 (N.D. Ill. 1951).

3. A joint motor-rail rate, such as was published by the plaintiffs, is required by section 216(c) of the Interstate Commerce Act to be just and reasonable. 49 U.S.C. §316(c).

4. Whether a given rate is, indeed, just and reasonable is a question of fact, and it is the function of the Commission to consider the evidence offered in support of a rate and to accord it appropriate weight. Board of Trade v. United States, 314 U.S. 534, 546 (1942); Illinois Central & C. R. R. v. Interstate Commerce Commission, 306 U.S. 441, 454 (1907).

5. In administering the provisions of section 216(c), as in administering the other sections of the Interstate Commerce Act, the Commission is obliged to consider the provisions of the National Transportation Policy, one of the tenets of which is to encourage the establishment and maintenance of reasonable charges for transportation services without destructive competitive practices. 49 U.S.C. preceding §1; McLean Trucking Co. v. United States, 321 U.S. 67, 82-83 (1944).

6. The Commission's finding that the proposed rate is unjust and unreasonable and constitutes a destructive competitive practice, as the subsidiary findings upon which the Commission's conclusion was based, was reasonable and supported by substantial evidence. See Chicago, R. I. & P. R. Co. v. United States, ... F. Supp. ..... (N.D. Ill. 1962).

7. Where, as herein, the Commission determines upon substantial evidence in the whole of the record, that a proposed rate is unjust and unreasonable and constitutes a destructive competitive practice, the Commission is empowered to require the cancellation of the offending schedules. 49 U.S.C. §§304(c), 316(e), 316(g) and 317(a); Malone Freight Lines v. United States, 159 F. Supp. 952 (N.D. Ala. 1957).

8. The requirement of section 15a(3) of the Interstate Commerce Act that the Commission not hold up the rate of one mode of transportation to protect the traffic of another mode is inapplicable where, as herein, one railroad, albeit under a proposed joint rate with a motor carrier, is seeking to provide additional services than are provided by other railroads, though at the same rate. 49 U.S.C. §15a(3); cf. New York, N. H. & H. R. Co. v. United States, 199 F. Supp. 635 (D. Conn. 1961); Missouri Pacific R. Co. v. United States, ... F. Supp. ..... (E.D. Mo. 1962). The Commission was justified in considering the substance of the service proposed to be performed rather than the form of the rate alone; that is, the publication of the joint rate did not prevent the Commission from considering the intramodal competitive situation in-

volved. See Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245, 271 (1936).

9. The Commission's conclusions, supported by substantial findings of fact based upon substantial evidence in the whole of the record, sufficiently disclose the basis of its judgment. Alabama G. S. R. Co. v. United States, 340 U.S. 216, 227-28 (1951); United States v. Pierce Auto Lines, Inc., 327 U.S. 515, 531-32 (1946).

10. This Court would depart from its competence and its limited function if it were to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case; this is a task peculiarly for the Commission. Ayrshire Corp. v. United States, 335 U.S. 573, 592-93 (1949);[1] Chicago & E. I. R. Co. v. United States, 107 F. Supp. 118, 125-26 (S.D. Ind. 1952), aff'd mem., 344 U.S. 917 (1953).

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[1] "There is no doubt therefore, that the Commission believed that the competitive factor was an important one in considering this problem of rate relationships. The result may, as appellants contend, favor some Illinois mines over Indiana as respects certain markets. That would seem to follow, for example, from the elimination of the low single-line rate that the Commission found to be disruptive of rate relations between these groups. But it does not indicate that the rates approved by the Commission were unlawful. That might be established by showing, for example, that the Commission gave weight only to the competitive factor. Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or in distance. That is not enough provided the Commission was justified in considering the element of competition.

"We think it was. Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate

11. The report and orders of the defendant, Interstate Commerce Commission, entered April 28, and August 31, 1961, in Investigation and Suspension Docket No. 7424, Bituminous Coal, Motor-Rail, Lynnville, Ind., to Chicago, have a rational basis and are valid and proper in all respects and, therefore, the relief sought by the plaintiffs should be denied and their complaint dismissed.

Wherefore, it is ordered that an appropriate final judgment and decree in accordance with the foregoing findings of fact and conclusions of law be entered.

Dated at Chicago, Illinois, this 4th day of June, 1962.

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[1] (Continued)
the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See Board of Trade v. United States, 314 U.S. 534, 548; New York v. United States, 331 U.S. 284, 247-249." [Emphasis added.]

APPENDIX B—Judgment.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and FLOYD N. LEMMONS,
Plaintiffs,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil Action
No. 61-C-1706

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on May 2, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. §2284, and this Court having this day filed its Findings of Fact and Conclusions of Law, sustaining the assailed orders of the defendant, Interstate Commerce Commission, it is hereby,

Ordered, Adjudged And Decreed that the temporary restraining order entered October 10, 1961, be vacated, that the relief prayed for in the complaint be denied and that the complaint be dismissed.

Dated at Chicago, Illinois, this 4th day of June, 1962.

.....
Win G. Knoch
United States Circuit Judge

.....
Joseph Samuel Perry
United States District Judge

.....
Michael L. Igoe
United States District Judge

APPENDIX C—Report of the Commission.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET

No. 7424

BITUMINOUS COAL VIA MOTOR-RAIL - LYNNVILLE, IND. TO CHICAGO, ILL.

Decided - April 28, 1961

Proposed initial, motor-rail rate on bituminous coal from Lynnville, Ind., to Chicago, Ill., found unjust and unreasonable. Schedules required to be canceled, and proceeding discontinued.

Patrick C. Mullen, Harvard R. Osmond, and Frank F. Vesper for respondents.

Robert M. Bierma, Ralph M. Buzek, Richard J. Murphy, Joseph J. Nagle, and Jack Rand for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND HERRING BY DIVISION 2:

Due and timely execution of our function under sections 15 (7) and 216 (g) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on September 1, 1960, the respondents[1] proposed to establish an initial single-factor motor-rail rate[2] of $3 minimum 1,000 tons, on bituminous coal from Lynnville, Ind., to Chicago, Ill., and points within the Chicago switching limits. Upon protest of The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee,

[1] Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons (MC-120586).

[2] Rates are stated per net ton.

St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and The New York, Chicago and St. Louis Railroad Company, the operation of the proposed schedules was suspended to and including March 31, 1961, and the effective date has been voluntarily postponed to and including May 15, 1961. Upon its effectiveness, the rate would be increased to $3.07 by the addition of the Ex Parte No. 223 increase.

At the hearing, and again on brief, the respondent objected to the appearance, and the testimony of the witnesses, in behalf of the protestants other than the New York Central. They argue that the protests are not a part of the record, that these protestants are not proper parties to this proceeding, and that they have not shown sufficient interest to intervene. The appearances of the protestants thus mentioned were duly entered of record, and they were entitled to submit evidence pertinent to the issues in the proceeding.

The rates on bituminous coal from Indiana, Illinois, and western Kentucky to the Chicago area are on an origin group and differential basis. The rate structure described in Fine Coal from Midwestern Mines to Chicago, 298 I.C.C. 37, as modified in Coal from Illinois, Indiana, and Kentucky to Illinois and Indiana, 308 I.C.C. 673, is the basis for the present rates. As subsequently increased through Ex Parte No. 223, the rates maintained by the railroads from the Princeton group to Chicago are $3.57 in single carloads and $3.07, minimum 1,000 tons. Lynnville is in the Princeton group; it is served by the New York Central, which has a fairly direct route to Chicago. However, to protect its long haul, that road will not participate in joint rates or routes with other carriers in the movement of coal from Lynnville to Chicago.

The proposed rate, which is the same as the all-rail rate, minimum 1,000 tons, would apply from Lynnville

over the motor route of Floyd N. Lemmons to Haubstadt, Ind., thence the Chicago & Eastern Illinois to destination. The respective motor and rail distances over this route are not revealed. The motor carrier has a 95-cent intrastate rate on coal from Lynnville to Evansville, Ind., about 30 miles, but has neither interstate or intrastate rates from Lynnville to Haubstadt. The respondents herein have not previously transported coal over any route from Lynnville to Chicago, and so far as appears the Chicago & Eastern Illinois is not a party to any rate on coal over any route from Lynnville to the Chicago district. Thus, the proposed rate is an initial rate, and the burden of showing its unlawfulness rests upon the protestants.

Under the tariff provisions, the proposed rate would apply on bituminous coal tendered at one time, on one bill of lading, by one consignor for delivery to one consignee at one destination, subject to a minimum of 1,000 tons per shipment. The protestants claim that this does not require the shipment of 1,000 tons at one time, but that the shipment may be tendered but not actually shipped on one day. The mine, which operates in two shifts about 15 hours a day, has two 700-ton tipples where it is said a 1,000-ton tender can be made. About 22 tons can be loaded on a truck. The actual loading of the truck is performed in about 2 minutes by the driver's operation of a loading device, after which the scale weight is determined. The motor carrier expects to use 5 vehicles in double shifts, or 8 to 10 vehicles in single shifts, each vehicle making 5 round trips a shift between the mine and Haubstadt. At the latter point the coal would be handled through facilities which were being built at the time of the hearing by the Chicago & Eastern Illinois for about $130,000, and rented to the motor carrier for 2 cents a ton.

When coal is loaded into rail cars, it is possible on some mine siding to load sufficient cars to accumulate 1,000 tons of coal at one time. It seems to us reasonable to construe the words "at one time" as meaning a period of not more than one calendar day. According to the

record, it would be practicable for the respondent motor carrier to transport the proposed minimum of 1,000 tons in that period.

Reconsignment privileges at Chicago permit free reconsignment of cars at destination, which it is urged authorizes delivery of cars at more than one spur or delivery points within the Chicago area. The term "destination" used in the tariff is broad enough to permit delivery at more than one location within a terminal area. Several large users of coal in Chicago do have more than one delivery location. However, delivery at more than one location in the same switching district would destroy the character of a volume rate. Iron or Steel Plate or Sheet, Illinois to La Crosse, 311 I.C.C. 81, 95.

Chicago is an important market for coal. During 1959, it received about 6 million tons from origins in Indiana, Illinois, and western Kentucky. Coal is an important segment of the protestants' traffic; for example, in that year six of them handled 198,974,794 tons, which was 27.4 percent of their carload tonnage, and produced about 5.6 percent of their revenue from all carload traffic. The coal traffic constitutes 38.9 precent of the New York Central's total traffic and accounts for 18.7 percent of its revenue.

Coal from Indiana, Illinois, and western Kentucky mines in the midwestern field moves to points of consumption by rail, rail-barge, motor-barge, and to some extent by motor. The volume by motor carriers is mostly for short distances and is increasing. Where production has been sufficiently large to justify the expenditure, the railroads have constructed spurs to off-rail mines. There are many mines which do not have rail service and must use either privately-owned motor vehicles or local motor carriers to move the coal to the railhead. However, the coal here sought to be attracted by the respondents is not of that type. It is produced at mines served by the New York Central and now moves over that road. The New York Central originated 1,315,000 tons of coal at Lynn-

ville in the first 10 months of 1960. By the instant proposal the respondents hope to divert about 200,000 tons of that traffic annually. If the proposed rate were approved, the evidence indicates that the New York Central would reduce its rate to prevent loss of the traffic; also, similar joint motor-rail arrangements could be expected to be made from other midwestern mines to the same and other destinations.

It has long been the practice of mines to bear the burden of transporting their coal to the railroads, and this encourages the delivery of the coal to the nearest railhead and maximizes net rail revenue. This practice has heretofore been respected by rail carriers generally. Reference is made to numerous mines in the midwestern field served by particular railroads which are only short highway distances from competing roads. Approval of the proposed rate, the protestants fear, would force midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads and absorb most or all of the cost of transporting the coal to the railhead. Moreover, to avoid unlawful discrimination, like arrangements would probably be required also from numerous off-rail mines. Ultimately, they fear, this might result in breaking down the present just and reasonable midwestern coal-rate adjustment.

The cross-hauling of coal by motor carriers to facilities of competing rail lines would entail additional services at the same group rates which are not presently performed. The divisions to the motor carriers of such joint rates would reduce the rail revenues and increase the cost of rendering the service. Coal is a relatively low-priced, heavy-loading commodity, and rail rates thereon are generally maintained at a low level in relation to the cost of performing the service. If the railroads were forced by competition to enter into joint motor-rail rates, thus increasing their transportation costs, with reductions in their revenues for this important segment of traffic, the results could be unnecessary dissipation of carrier revenues and serious disturbance of a just and reasonable

rate adjustment, in contravention of the national transportation policy.

For the foregoing reasons, we find that the proposed schedules constitute a destructive competitive practice, and are unjust and unreasonable. An order will be entered requiring their cancellation and discontinuing the proceeding.

Commissioner Freas, dissenting in part:

I agree with the conclusions that this is an initial rate and that delivery at more than one location in the same switching district would destroy the character of the volume rate. However, in the absence of convincing cost evidence or rate comparisons I find no support for holding that the proposed rates are shown to constitute a destructive practice or to be unjust and unreasonable.

APPENDIX D—Order of the Commission.

ORDER

At a Session of the Interstate Commerce Commision, Division 2, acting as an Appellate Division, held at its office in Washington, D. C. on the 31st day of August, A. D. 1961.

INVESTIGATION AND SUSPENSION DOCKET

No. 7424

BITUMINOUS COAL VIA MOTOR-RAIL-LYNNVILLE, IND. TO CHICAGO, ILL.

Upon consideration of the record in the above-entitled proceeding and petition of respondents, Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons, for reconsideration of the report and order of Division 2, decided April 28, 1961, and for oral argument, filed June 5, 1961; and reply thereto by protestants, filed July 10, 1961;

It is ordered, That the petition for reconsideration and oral argument be, and it is hereby, denied, for the reason

that the matters submitted in support thereof do not constitute substantial and material grounds to warrant granting the action sought;

And it is further ordered, That the order entered in this proceeding on April 28, 1961, which order, pursuant to section 17 (8) of the Interstate Commerce Act was stayed pending disposition of the petition, be, and it is hereby, reinstated and modified so as to become effective on October 16, 1961, without change in the requirements of said order.

By the Commission, Division 2, acting as an appellate division.

Harold D. McCoy
Secretary

(Seal)

Office Supreme Court, U.S.
FILED
SEP 20 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM A.D. 1962.

No. 360

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

and

FLOYD N. LEMMONS,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

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Attorneys for Rail Carrier Appellees

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 360

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

and

FLOYD N. LEMMONS,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

This Motion to Affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument is filed pursuant to Rule 16 of the Rules of Practice of this Court on behalf of The New York, Chicago and St. Louis

Railroad Company; The Baltimore and Ohio Railroad Company; The Pennsylvania Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad; Illinois Central Railroad Company and The New York Central Railroad Company. These railroads were protestants in the prior proceeding before the Interstate Commerce Commission (sometimes hereinafter referred to as the "Commission")[1] intervenors-as-defendants in the Court proceeding and are appellees in this Court. (The above named railroads are sometimes hereinafter referred to collectively as "intervenors" and individually as "Nickel Plate"; "B&O"; "Pennsylvania"; "IC" and "Central." Similarly appellants will sometimes be referred to as the "C&EI" and "Lemmons.")

[1] Likewise the Interstate Commerce Act (49 U.S.C., National Transportation Policy [Preceding §§ 1, 301, 901, 1001], §§ 1 *et seq.*) is sometimes hereinafter referred to as the "Act."

I. INTRODUCTION

The rate involved in the proceeding before the Commission was a joint motor-rail rate on bituminous coal from Lynnville, Indiana, to Chicago, Illinois, in the amount of $3.07 per net ton.[2] Appellants correctly state that the said rate is published on the same level as the all-rail rate from Lynnville, Indiana to Chicago, Illinois. The Court is here called upon to review the order of the United States District Court for the Northern District of Illinois (Eastern Division) dismissing appellants complaint attacking the order of the Interstate Commerce Commission which ordered the said rate cancelled.[3] [4]

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[2] This amount includes an increase of 7 cents per net ton permitted by the Commission pending investigation in *Increased Freight Rates, 1960 (Ex Parte 223, Sub No. 5)*, 311 I.C.C. 373, *approved after investigation*, ——I.C.C.—— (Mimeo. April 18, 1962), *reconsideration denied*, July 31, 1962 (Mimeo). All rates hereinafter referred to include the said increase.

[3] At the conclusion of oral argument before the District Court, the Court requested that each of the parties submit for consideration Findings of Fact and Conclusions of Law. Such proposed findings and conclusions were filed by appellants and by the Commission. Intervenors at their request were permitted to examine the Commission's proposed findings and conclusions prior to their submittal to the Court. Since, in their opinion, those findings and conclusions thoroughly and correctly disposed of all issues in the action as to the facts of the case, the contentions of the parties and the applicable law, intervenors adopted those findings and conclusions as their own and so advised the court.

[4] For the convenience of the Court the Findings of Fact and Conclusions of Law of the District Court below and the decision of the Commission have been reproduced and are attached hereto as Appendicies A and B, respectively. Additionally, as Appendix C hereto, Intervenors have reproduced the following sections of the Interstate Commerce Act, which sections intervenors believe are material to this case and were not included by appellants in their jurisdictional statement: §§15a(1), (2); 216(g), (i) of the Interstate Commerce Act [49 U.S.C. §§15a(1), (2); 316(g), (i)].

While appellants have, at all stages in this proceeding, sought to create the illusion that the assailed rate and the practice, which is necessarily a part of it, are unrelated to any rate other than the Central's rate from Lynnville to Chicago, the fact is that no rate on coal from an important producing area such as the midwestern coal field to an important consuming area such as Chicago can ever be considered alone. See *Aryshire Corp.* v. *United States*, 335 U.S. 573, 592-593 (1949). Rather, in order to understand the nature of the controversy and the Commission's decision, it is necessary briefly to explore the nature of the rate structure as well as the recent prior litigation involving specifically the midwestern coal rate structure.

For many years rates from the midwestern mine field (in which the Lynnville Mine is located) to Chicago have been on an origin group and differential basis.[5] All such rates apply on coal loaded in cars and do not include the transportation of coal to the railroad. This applies whether or not the railroad connects directly with the mine. The evidence presented at the hearing before the Commission showed, and the Commission found, that this method of publishing rates tends to provide maximum efficiency in total transportation costs to the shipper since any given mine would tend to transport its coal to the nearest railroad, thereby minimizing its transportation burden.

In 1956 the Commission concluded an investigation of reduced rates from the midwestern mine field to Chicago. *Fine Coal From Midwestern Mines to Chicago*, 298 I.C.C. 37. There the Commission considered the contentions of

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[5] The origin group and differential rate structure means that the rates from all origins within a group to Chicago are identical, and the rates from origins in any given group are related to the rates from origins in any other group in the amount of a fixed differential in cents per net ton.

seven distinct groups of parties in detail, including the C&EI as one of the Group II parties. The C&EI (along with many of the intervenors) contended that, in view of the importance of coal revenues to the midwestern coal carrying railroads, the rates under investigation should be disapproved and higher rates prescribed. The C&EI and other railroads also pointed out that the reduced midwestern rates at issue in that case might also effect the rate structure of eastern coal to Chicago.[6] The C&EI view prevailed and the Commission prescribed increased rates.[7] It has never been contended, in the instant proceeding, that the prescribed rate structure is in any way unjust or unreasonable and the Commission specifically found it to be reasonable. (Appendix B, p. 17)

At the hearing, intervenors presented testimony, by expert witnesses, relative to the importance of the specific traffic to the Central, and of the coal rate structure to the midwestern coal carrying railroads as a whole. Witnesses representing intervenors, Central, Pennsylvania, IC, Milwaukee, and B&O testified as to the destructive effect which the assailed rate would have on each of their railroads and on the rate structure. A sixth witness, chairman of a committee of railroads transporting eastern coal, testified to the deleterious effect upon the eastern and midwestern coal rate structures which would result if appellants were permitted to institute a practice of publishing joint motor-rail rates at the same level as the all-rail rates.

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[6] An excerpt from the Commission's decision outlining the contentions of the Group II parties is attached hereto as Appendix D.

[7] In 1959 the Commission modified its findings to permit the railroads to publish reduced volume rates to meet barge competition. *Coal from Illinois, Indiana and Kentucky to Illinois and Indiana*, 308 I.C.C. 673.

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The Central's witness testified that the Lynnville Mine is the largest single mine served by the Central and that in the first ten months of 1960 the Central originate 1,315,000 tons there. Further, the Central has invested approximately $250,000 in facilities to serve the mine and in order to protect its investment the Central would reduce its rate if the rate at issue were permitted to become effective. Further, that witness showed that the Central could reduce its rate and continue to retain some measure of profit.[8] This reduction would necessarily result in a compensating reduction in other rates within the midwestern coal field to preserve the differential relationship discussed above. That witness also testified as to the importance of coal to the intervenors including the Central. For example, in the year 1959, coal accounted for 38.971 per cent of the Central's tonnage and 18.731 of its revenue. The intervenors as a group transported almost two hundred million tons of coal in that year and obtained almost four hundred million dollars in revenue.[9]

The various witnesses appearing on behalf of intervenors testified as to the diseconomies of the practice of publishing joint motor-rail rates at the same level as the all-rail rates. Specifically the witness for the Pennsylvania testified affirmatively that if the type of rate making proposed by appellants were approved, his railroad would undertake to publish similar rates. That witness also prepared exhibits showing both traffic which could be diverted to the Pennsylvania from other railroads through this type of publication and traffic which could be diverted from it to other railroads.

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[8] In argument before the District Court appellants affirmed the right of the Central to reduce its rate to a level at or in excess of its out-of-pocket cost. (Appendix A, Finding 12, pp. 5-6).

[9] Attached hereto as Appendix E is a statement showing the importance of coal to each of the intervenors.

Similarly, other railroads as well as the association witness testified as to the serious effect which establishment of the rate at issue and the consequences of such establishment would have on their traffic and on the rate structure as a whole.

At the hearing appellants chose neither to challenge the statements of the various rail witnesses nor to submit substantial affirmative evidence of their own. Since the date of the hearing appellants have, however, without success, attempted to attack in briefs and pleadings, before the Commission and the District Court, the unchallenged testimony of the railroad witnesses as to the results necessarily flowing from the rate at issue.

As might well be expected, the Commission in reaching its decision relied on the uncontroverted evidence presented by intervenors and concluded that the net effect of the proposed rate was to provide additional service not contemplated in the midwestern coal rate structure and that, therefore, the practice proposed could reduce rail revenues. This reduction, the Commission said, would result from other railroads being forced by competition to enter into similar arrangements. (Appendix B, p. 17). The reduction was particularly important in view of the fact that coal is a relatively low-priced heavy-loading commodity, and the rail rates thereon are necessarily maintained at a low level in relation to the cost of performing the service. Thus, the rate constituted a destructive competitive practice rendering it unjust and unreasonable. The Commission, therefore, required its cancellation.

II. ARGUMENT

While appellants have propounded thirteen questions to be considered by the Court, intervenors believe that those questions either have no basis whatever in the record or are founded on serious misconceptions of law and fact rendering them unsubstantial. The few questions which are in fact, raised by this cause have been decided by this Court in prior cases and should not again be considered. Below, intervenors have examined each of the questions propounded in the order in which they appear in the jurisdictional statement.

QUESTION 1: *Is an order of the Interstate Commerce Commission valid if it is founded only on the National Transportation Policy, without reference to, or basis in, any substantive provision of law?*

COMMENT: This question is not relevant to the disposition of this appeal since it presumes that the order of the Commission has no basis in any provision of substantive law. Indeed, as the Court held, the rate at issue was required to be just and reasonable by Section 216(c) of the Interstate Commerce Act [49 U.S.C. § 316(c)] and in construing that section the Commission is obliged to consider the National Transportation Policy (Conclusions 3 and 5, Appendix A, pp. 8, 9).

While appellants would have this Court believe that some destructive competitive practices are lawful and some unlawful, the cases cited by them do not so hold.[10]

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[10] *New York, N. H. & H. R. Co. v. United States*, 199 F. Supp. 635 (D. Conn. 1961); *Missouri P. R. Co. v. United States*, 203 F. Supp. 629 (E.D. Mo., E.D. 1962); *St. Louis S. F. R. Co. v. United States*, — F. Supp. — (Civil No. 61 C 309 [1], E.D. Mo., E.D. 1962, not yet printed.)

Rather, those cases define destructive competitive practices as they relate to intermodal competitive situations under Section 15a(3) of the Act [49 U.S.C. § 15a(3)]. As will appear below Section 15a(3) is inapplicable to the rate at issue. Further, even if that section were applicable, the rate clearly constitutes a destructive competitive practice since the C&EI is an important midwestern coal carrying railroad and would suffer greatly from the destruction of the midwestern coal rate structure. Its stake in that structure is eloquently testified to by its participation in *Fine Coal from Midwestern Mines to Chicago, supra*, and *Coal from Illinois, Indiana, and Kentucky to Illinois and Indiana, supra*. Thus, in acting to preserve the said rate structure the Commission protected the C&EI as well as all parties to that rate structure against a rate which would be harmful to the proponent thereof. See *New York, N.H. & H. R. Co.* v. *United States*, 199 F. Supp. 635, 642 (D. Conn. 1961); *Missouri P. R. Co.* v. *United States*, 203 F. Supp. 629, 634 (E. D. Mo., E. D. 1962); *St. Louis S. F. R. Co.* v. *United States*, ... F. Supp. ..... (Civil No. 61 C 309 [1], E. D., Mo., E. D. 1962, not yet printed.)

QUESTION 2: *Did the Commission exceed its statutory authority in ordering cancelled a joint motor-rail rate which Congress had authorized?*

COMMENT: The unsubstantial nature of this question is evident from appellants discussion on page 11-13 of their jurisdictional statement. They begin by attempting to introduce a portion of a brief of the United States in another action, *United States* v. *Association of American Railroads*, 36 F. Supp. 225 (D.C. 1940), and a consent decree entered in that action.

A detailed discussion of that case is unwarranted at this time.

However, as pointed out in the District Court, the consent decree provided specifically that the Court having jurisdiction of the action, retained jurisdiction for the purpose *inter alia* of punishing violations thereof. To date, as far as intervenors are aware, the jurisdiction of that Court, has not been invoked to punish any alleged violations of the said consent decree within the scope of the subject matter of this litigation. Certainly neither this Court nor the District Court below nor the Interstate Commerce Commission is the proper forum in which to allege violations of that decree.

Appellants also allege in support of this question that the Commission left appellant Lemmons unable to participate in interstate commerce. First they assume that the Commission held all joint rates between Lemmons and a railroad to be unlawful. This is not the case. The Commission did not purport to decide anything other than the specific rate which was before it.

Additionally, Lemmons could participate in interstate commerce through the publication of a rate from a mine to a railroad to apply in conjunction with a rail rate beyond. In support of their statement that this cannot be done, appellants cite I.C.C. Circular No. 20, Supplement 4, Rule 31, which they claim prohibits railroads from filing proportional rates[11] in connection with motor carriers. What appellants did not state is that the said Supplement 4 was superseded in 1956 by Supplement 8 to the said Circular 20 and that, in the said Supplement 8, Rule 31 was cancelled (page 57). The reason for the cancellation is that the Commission believed the form of publication there-

[11] A proportional rate is one which applies only on condition of a named prior or subsequent movement.

tofore prohibited by that rule to be authorized by Congress and therefore lawful.[12]

Thus, appellants' contentions on this question are based on an unrelated case not of record herein, conclusions not reached by the Commission, and a rule of the Commission which has not existed since 1956.

QUESTION 3: *Is Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)) relating to intermodal competition, applicable to competition between rail carriage and joint motor-rail carriage?*

QUESTION 4: *If the answer to question 3 is in the affirmative, must not the Commission make the findings required by Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3))?*

QUESTION 5: *If the answer to question 3 is in the negative, must not the Commission make a finding with respect thereto when the issue is raised in a proceeding involving competition between rail carriage and joint motor-rail carriage?*

QUESTION 6: *May the Commission, in the absence of cost evidence or unfavorable rate comparisons, require the cancellation of a proposed joint motor-rail rate in competition with all-rail rates, on the grounds that it constitutes a destructive competitive practice and is unjust and unreasonable?*

QUESTION 7: *May the Commission, and the District Court, disregard, and fail to make findings concerning, evidence of extensive and costly operating difficulties over all-rail routes which compete with a proposed motor-rail route?*

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[12] Attached hereto as Appendix F is an excerpt from the Federal Register wherein the Commission explains the cancellation of the said Rule 31.

COMMENT: These questions relating to Section 15a(3) of the Interstate Commerce Act are based on the premise that, when the C&EI joined in the rate at issue with a motor carrier, it ceased to be a railroad and became some other mode of transportation. From this premise, appellants leap to the unlikely conclusion that the C&EI can be a railroad subject as such to the Interstate Commerce Act and a party to a rail rate structure prescribed at its request, and simultaneously be another mode of transportation attacking the identical rate structure.

Followed to its logical conclusion this argument means, as appellants stated in argument before the District Court (Finding 12, Appendix A p. 5) that the Central could institute counter reductions which the Commission would be powerless to prevent as long as the Central's rate covered out-of-pocket costs. Thus, through the publication of a single joint motor-rail rate from one mine the Commission would be rendered powerless to protect a rate structure involving six million tons of coal annually from mines in three states. This would run directly contrary to Section 15a(2) of the Act [49 U.S.C. §15a(2)[13]].

In argument appellants contend that the Commission failed to consider the provision of the National Transportation Policy to the effect that the Commission is to preserve the inherent advantages of each mode of transportation and that the Commission ignored "uncontroverted evidence" that the joint motor-rail route was the low-cost route.

Evidence such as appellants purport to describe does not exist anywhere on the record. Indeed, when at the hearing an attorney for intervenors attempted to cross-

[13] See Finding 13, Appendix A, pp. 6-9.

examine appellant Lemmons as to his satisfaction with his division of the proposed rate appellants objected.

The only attempt made by appellants to introduce evidence as to its cost was in an unsworn petition for reconsidering of the Commission's order suspending the rates at issue. Such statements prior to hearing do not constitute evidence under Rule 1.19 of the Commission's General Rules of Practice.[11]

On the contrary, the only evidence presented at the hearing showed that the all-rail route was more efficient since under the proposed rate three roundtrips by truck and a transfer of lading would be required to fill a single rail car, and that all-rail routes in general are more efficient since the type of rate making proposed by the C&EI would introduce uneconomical transportation into the midwestern coal rate structure. This evidence was uncontroverted.

QUESTION 8: *Did the Commission, by administrative fiat, unlawfully restrict the applicability and scope of the Second Proviso to Section 206 (a)(1) of the Interstate Commerce Act (49 USC § 306(a)(1) relating to motor transportation in interstate commerce over routes wholly within a single state?*

COMMENT: The basis for this question is not quite clear in the argument presented. Insofar as appears from the Commission's decision and from proceedings before the Commission and the Court, appellant Lemmons received the same treatment as any carrier possessing his operating authority regardless of how obtained.

QUESTION 9: *Is the Commission empowered to require cancellation of joint motor-rail rates without determining and prescribing the lawful rate, or the*

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[11] A copy of that rule as well as the denial of the facts stated in the said petition are attached hereto as Appendix G.

maximum or minimum, or the maximum and minimum, rate or rates thereafter to be observed?

COMMENT: This question is completely covered by the District Court in Finding 14 and Conclusion 7. (Appendix A, pp. 7, 9)

QUESTION 10: *Did the Commission deny the Defendants (Plaintiffs-Appellants herein) a full and fair hearing in violation of the due process clause of the Fifth Amendment of the Constitution of the United States, the Administrative Procedure Act, and its own General Rules of Practice?*

COMMENT: The argument in support of the questions presented contains no clue as to appellants' purpose in stating this question. Therefore, it will not be further discussed.

QUESTION 11: *Is the Commission's order supported by adequate and requisite findings of fact having a rational basis?*

COMMENT: This question is best answered by respectfully referring the Court to the Commission's report. (Appendix B).

QUESTION 12: *Are the Commission's order and findings supported by substantial evidence of record?*

COMMENT: Appellants argument does not discuss this question to any extent. This question is, however, completely answered by the District Court's Conclusions (Appendix A, pp. 6 and 11). It is impossible, within the scope of this motion, to discuss in detail all the evidence before the Commission. Intervenors submit, however, that the entire record was before the District Court and that the conclusion of the District Court that the Commission's findings are supported by evidence of record should not be disturbed.

QUESTION 13: *Did the District Court err in failing and refusing to enjoin, annul, and set aside the order of the Commission in Investigation and Suspension Docket No. 7424, Bituminous Coal Via Motor-Rail —Lynnville, Indiana to Chicago, Illinois?*

COMMENT: This question is, of course, the ultimate one to be decided by this Court.

III. CONCLUSION

While many questions have been propounded by appellants, this appeal, in the final analysis depends on the single question of whether the Commission had the power to prevent a rail carrier from destroying a rail rate structure prescribed at its request and of which it constitutes an important part. On this question the Court must necessarily rule affirmatively. *Aryshire Corp.* v. *United States, supra; Board of Trade* v. *United States*, 314 U.S. 534; *New York* v. *United States*, 331 U.S. 284.

The Findings of Fact and Conclusions of Law of the District Court amply deal with all matters presented to it. Intervenors submit that the questions of law relevant to the disposition of this cause have been answered by this Court on many prior occasions. Therefore, this motion to affirm without further argument, should be granted.

Respectfully submitted,

ROBERT G. BOES,
RALPH M. BUZEK,
ROBERT H. BIERMA,
JOSEPH J. NAGLE,
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RICHARD J. MURPHY,
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Attorneys for Rail Carrier Appellees

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also the Solicitor General, Department of Justice, Washington 25, D. C., by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at Chicago, Ill. this 19th day of September, 1962.

RICHARD J. MURPHY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and FLOYD N. LEMMONS,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

Civil Action
No. 61-C-1706

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action to enjoin, annul and set aside orders of the defendant, Interstate Commerce Commission, having come on for hearing on May 2, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. §2284, upon the plaintiffs' complaint and the defendants' answers thereto, and the Court having received in evidence a certified copy of the record of the proceedings before the Commission; now, after reviewing said record in its entirety and hearing oral arguments of counsel for the respective parties and after consideration of said arguments and the written briefs of counsel, the Court makes and enters the following findings of fact and conclusions of law:

Findings of Fact

1. By schedules filed with the defendant, Interstate Commerce Commission, and published to become effective on September 1, 1960, the plaintiffs, Chicago & Eastern Illinois Railroad Company, a common carrier railroad, hereinafter referred to as C&EI, subject to regulation under Part I of the Interstate Commerce Act, 49 U.S.C. §1 *et seq.*, and Floyd N. Lemmons, a common carrier by motor vehicle, hereinafter referred to as Lemmons, subject to regulation under Part II of the Interstate Commerce Act, 49 U.S.C. §301 *et seq.*, proposed to establish a joint motor-rail rate of $3 per ton, minimum 1,000 tons, on bituminous coal from Lynnville, Indiana, to Chicago, Illinois, and points within the Chicago switching limits.

2. The intervening defendants, The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and The New York, Chicago and St. Louis Railroad Company, duly protested the filing of the proposed rate with the Commission.

3. Operation of the proposed rate was ordered suspended to and including March 31, 1961, by order of the Commission entered August 29, 1960, by which the Commission instituted an investigation into the lawfulness of the proposed rate, docketed as Investigation and Suspension Docket No. 7424, *Bituminous Coal Via Motor-Rail From Lynnville, Ind., to Chicago, Ill.*

4. The investigation proceeding not having been concluded at the expiration of the period of suspension, the plaintiffs voluntarily postponed the effective date to and including May 15, 1961, when the rate, as increased to $3.07, went into effect.

5. Hearing was had before an examiner of the Commission at Chicago on December 14, 1960, at which testimony and exhibits were received in evidence.

6. The parties filed briefs on January 30, 1961.

7. On April 28, 1961, the Commission, Division 2, entered its report and order in which it found the proposed rate to be unjust and unreasonable and to constitute a destructive competitive practice. 313 I.C.C. 573.

8. In addition to its ultimate finding above, the Commission found that:

A. Lynnville, the origin from which the rate at issue was published, is located in the Princeton Group of the midwestern mine field located in the States of Illinois, Indiana, and Kentucky.

B. The rates applicable from the said mine field to Chicago are on a group and differential basis as prescribed in *Fine Coal From Midwestern Mines to Chicago*, 298 I.C.C. 37 (1956), as modified in *Coal From Illinois, Indiana, and Kentucky to Illinois and Indiana*, 308 I.C.C. 673 (1959). The rates from different origins within a single group are identical and the rates applying from origins in any group are differentially related in a fixed amount of cents per net ton to the rates applicable from origins in any other origin group.

C. The rates embodied in the midwestern rate structure apply on coal loaded in cars, the shipper bearing the cost of transportation from its mine to the railroad, which practice tends to encourage a mine to transport its coal to the nearest railroad.

D. In addition to performing the rail line-haul movement to Chicago, plaintiffs would undertake the truck transportation of the coal from the mine at Lynnville to

the C&EI railhead at Haubstadt, Indiana, and its transfer from truck to rail car through the facility there built for this purpose. The undertaking of additional services not presently performed at the same group rates would increase the cost of rendering the service and reduce the rail revenues.

E. Chicago is an important market for midwestern coal, having received during 1959 approximately six million tons. Likewise, coal is an extremely important commodity to protestants. During the year 1959 the six protestants handled almost 200,000,000 tons of coal. Coal traffic constitutes approximately 38.9 percent of the New York Central's tonnage, and approximately 18.7 percent of its revenue. Specifically, the coal originating at Lynnville is important to the Central as illustrated by the fact that during the first ten months of 1960 the Central originated 1,315,000 tons of coal at that location.

F. Should the assailed rates be permitted to become effective, the New York Central would reduce its rate to prevent loss of traffic.

G. Similar joint motor-rail arrangements could be expected to be published by other railroads in conjunction with Lemmons or some other motor carrier. Such practices would cause railroads to absorb most or all of the cost of transporting the coal from the mine to the railroad. Additionally, to avoid unlawful discrimination, like arrangements would probably be required from numerous off-rail mines.

H. The cross-hauling of coal by motor carriers to facilities of competing railroads would entail services at the same group rates which services are not presently performed. The divisions to the motor carriers of such joint rates would reduce the rail revenues and increase the cost of rendering the service.

1. Coal is a relatively low-priced heavy-loading commodity. The rail rates thereon are generally maintained at a low level in relation to the cost of performing the service.

J. If railroads were forced by competition to enter into joint motor-rail rates with increased transportation costs and reduced revenues on their important coal traffic, the results could be the unnecessary dissipation of their revenues and a serious disturbance to the just and reasonable rate structure in contravention of the National Transportation Policy.

9. The Commission concluded that the plaintiff's schedules naming the proposed rate constitute a destructive competitive practice and are unjust and unreasonable, and ordered the schedules cancelled.

10. The plaintiffs, on June 5, 1961, petitioned the Commission for reconsideration of its report and order, and on August 31, 1961, their petition was denied.

11. The instant suit was brought on October 10, 1961, on which date, this Court, the Honorable Michael L. Igoe, entered a temporary restraining order, which, by stipulation of the parties, has been continued in effect *pendente lite*.

12. While many grounds for the Court's holding invalid the order of the Commission have been urged by plaintiffs, which grounds were replied to by defendant and intervenors (hereinafter collectively referred to as defendants), the basic disagreement among the parties arises from the approach taken by the Commission in deciding the case. Plaintiffs assert that the Commission should have considered the assailed rate independently of the midwestern rate structure, while the defendants state that the Commission correctly considered that rate in

terms of the rate structure of which it would become a part. In argument before this Court plaintiffs asserted that the Central could lawfully reduce its rate to a level covering the out-of-pocket cost of performing the service, and that reductions of other rail rates should be denied by the Commission only if such reduced rates fail to cover out-of-pocket costs. Defendants state in reply that the Commission had the power to protect the prescribed just and reasonable midwestern coal rate structure from the attack of a single rail carrier by preventing the initial act which would lead to its impairment and to the consequent substantial reduction in rail revenues.

13. Plaintiffs claim support for their contention in section 15a(3) of the Interstate Commerce Act, 49 U.S.C. § 15a(3), which provides:

> In a proceeding involving competition between carriers of *different modes* of transportation subject to this Act, the Commission in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, *giving due consideration to the objectives of the national transportation policy declared in this Act.* [Emphasis added.]

Defendants reply by pointing out that, while a motor carrier is a party to the assailed rate, the service performed thereunder is essentially rail and is no different than the service performed at numerous off-rail mines in the midwestern mine field. Since Section 15a(3) of the Act by its terms applies only to inter-modal competition, they say, the Commission retains power to protect a rail rate structure from the assault of a single railroad even though

a motor carrier may be the instrumentality employed by such a railroad to compete. Further, defendants state that since Section 15a(3) of the Act makes reference to the National Transportation Policy, that policy should be considered in its construction. The National Transportation Policy declares it to be the policy of Congress *inter alia*

> to encourage the establishment and maintenance of reasonable charges for transportation services, without . . . destructive competitive practices . . .

Thus, defendants argue that, even if Section 15a(3) were applicable, it must be construed, as specifically required by its terms, in accordance with the National Transportation Policy forbidding destructive competitive practices and that the destruction of an adjudged reasonable coal rate structure for the temporary gain of a single railroad, party to that structure, constitutes such a practice.

14. Plaintiffs also contend that the Commission was powerless to order the assailed rate cancelled without simultaneously prescribing a just and reasonable rate for the future. This argument is based on Section 216(e) of the Interstate Commerce Act, 49 U.S.C. § 316(e), which provides that in proceedings arising by complaint or by investigation upon the initiative of the Commission, when the Commission finds a rate to be unlawful "it shall determine and prescribe the lawful rate . . ." Defendants point out, however, that this proceeding arose under 216(g) of the Act, 49 U.S.C. § 316(g), which deals with the investigation and suspension of new rates. That section, in effect, provides that, in a proceeding arising thereunder, the Commission *may* enter an order as would be proper in a proceeding arising under Section 216(e). Defendants point out that the language in Section 216(g) is permissive and that it is customary for the Commission in a

proceeding arising under that section to order rates cancelled without prescribing rates for the future. They cite *Malone Freight Lines* v. *United States*, 159 F. Supp. 952 (N.D. Ala. 1957), a case decided by a statutory three-judge court and upholding the Commission's right to order cancellation of an unlawful rate under 216(g).

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter in this cause. 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325; *Midwest Emery Freight System, Inc.* v. *United States*, 202 F. Supp. 229 (N.D. Ill. 1961).

2. The task of this Court in reviewing the assailed actions of the Commission is limited and well-defined: If the orders complained of lie within the scope of the statute which the Commission is empowered to administer and enforce and are based upon substantial evidence, this Court may not set them aside or modify them, even though it may have decided otherwise originally and even though the orders may be against the weight of the evidence. 5 U.S.C. § 1009(e); *Illinois Cent. R. Co.* v. *United States*, 101 F. Supp. 317, 327 (N.D. Ill. 1951).

3. A joint motor-rail rate, such as was published by the plaintiffs, is required by section 216(c) of the Interstate Commerce Act to be just and reasonable. 49 U.S.C. § 316(c).

4. Whether a given rate is, indeed, just and reasonable is a question of fact, and it is the function of the Commission to consider the evidence offered in support of a rate and to accord it appropriate weight. *Board of Trade* v. *United States*, 314 U.S. 534, 546 (1942); *Illinois Central & C. R. R.* v. *Interstate Commerce Commission*, 306 U.S. 441, 454 (1907).

5. In administering the provisions of section 216(c), as in administering the other sections of the Interstate Commerce Act, the Commission is obliged to consider the provisions of the National Transportation Policy, one of the tenets of which is to encourage the establishment and maintenance of reasonable charges for transportation services without destructive competitive practices. 49 U.S.C. preceding § 1; *McLean Trucking Co. v. United States*, 321 U.S. 67, 82-83 (1944).

6. The Commission's finding that the proposed rate is unjust and unreasonable and constitutes a destructive competitive practice, as the subsidiary findings upon which the Commission's conclusion was based, was reasonable and supported by substantial evidence. *See Chicago, R. I. & P. R. Co. v. United States*, ... F. Supp. ..... (N.D. Ill. 1962).

7. Where, as herein, the Commission determines upon substantial evidence in the whole of the record, that a proposed rate is unjust and unreasonable and constitutes a destructive competitive practice, the Commission is empowered to require the cancellation of the offending schedules. 49 U.S.C. §§ 304(c), 316(e), 316(g) and 317(a); *Malone Freight Lines v. United States*, 159 F. Supp. 952 (N.D. Ala. 1957).

8. The requirement of section 15a(3) of the Interstate Commerce Act that the Commission not hold up the rate of one mode of transportation to protect the traffic of another mode is inapplicable where, as herein, one railroad, albeit under a proposed joint rate with a motor carrier, is seeking to provide additional services than are provided by other railroads, though at the same rate. 49 U.S.C. § 15a(3); cf. *New York, N. H. & H. R. Co. v. United States*, 199 F. Supp. 635 (D. Conn. 1961); *Missouri Pacific R. Co. v. United States*, [203] F. Supp. [629] (E.D. Mo.

1962). The Commission was justified in considering the substance of the service proposed to be performed rather than the form of the rate alone; that is, the publication of the joint rate did not prevent the Commission from considering the intramodal competitive situation involved. See *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, 271 (1936).

9. The Commission's conclusions, supported by substantial findings of fact based upon substantial evidence in the whole of the record, sufficiently disclose the basis of its judgment. *Alabama G. S. R. Co. v. United States*, 340 U.S. 216, 227-28 (1951); *United States v. Piercy Auto Lines, Inc.*, 327 U.S. 515, 531-32 (1946).

10. This Court would depart from its competence and its limited function if it were to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case; this is a task peculiarly for the Commission. *Ayrshire Corp. v. United States*, 335 U.S. 573, 592-93 (1949);[1] *Chicago*

[1] "There is no doubt, therefore, that the Commission believed that the competitive factor was an important one in considering this problem of rate relationships. The result may, as appellants contend, favor some Illinois mines over Indiana as respects certain markets. That would seem to follow, for example, from the elimination of the low single-line rate that the Commission found to be disruptive of rate relations between these groups. But it does not indicate that the rates approved by the Commission were unlawful. That might be established by showing, for example, that the Commission gave weight only to the competitive factor. Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or in distance. That is not enough, provided the Commission was justified in considering the element of competition.

"We think it was. Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. *We would depart from our competence and our limited function in this field if we undertook to accommodate the*

al E. I. R. Co. v. United States, 107 F. Supp. 118, 125-26 (S.D. Ind. 1952), aff'd mem., 344 U.S. 917 (1953).

11. The report and orders of the defendant, Interstate Commerce Commission, entered April 28, and August 31, 1961, in Investigation and Suspension Docket No. 7424, *Bituminous Coal, Motor-Rail, Lynnville, Ind., to Chicago*, have a rational basis and are valid and proper in all respects, and, therefore, the relief sought by the plaintiffs should be denied and their complaint dismissed.

WHEREFORE, it is ordered that an appropriate final judgment and decree in accordance with the foregoing findings of fact and conclusions of law be entered.

Dated at Chicago, Illinois, this 4th day of June, 1962.

.....

Win G. Knoch
United States Circuit Judge

.....

Joseph Samuel Perry
United States District Judge

.....

Michael L. Igoe
United States District Judge

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factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and *finely balanced rate structure* for this coal, there is no place for dogma or rigid formulae. *The problem calls for an expert, informed judgment on a multitude of facts.* The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. *See Board of Trade v. United States*, 314 U.S. 534, 548; *New York v. United States*, 331 U.S. 284, [3]47-[3]49." [Emphasis added.]

APPENDIX B

29401

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 7424

BITUMINOUS COAL VIA MOTOR-RAIL FROM LYNNVILLE, IND., TO CHICAGO, ILL.

Decided April 28, 1961

Proposed initial, motor-rail rate on bituminous coal from Lynnville, Ind., to Chicago, Ill., found unjust and unreasonable. Schedules required to be canceled, and proceeding discontinued.

Patrick C. Mullen, Harvard R. Osmond, and *Frank J. Vesper* for respondents.

Robert M. Bierma, Ralph M. Luzek, Richard J. Murphy, Joseph J. Nagle, and *Jack Rand* for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, and HERRING.

BY DIVISION 2:

Due and timely execution of our functions under sections 15(7) and 216(g) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on September 1, 1960, the respondents[1] proposed to establish an initial single-factor motor-rail rate of $3 minimum 1,000 tons, on bituminous coal from Lynnville, Ind., to Chicago, Ill., and points within the Chicago switching limits. Upon protest of The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and The New York, Chicago and St. Louis Railroad Company, the operation of the proposed schedules was suspended to and including March 31, 1961, and the effective date has been voluntarily postponed to and including May 15, 1961. Upon its effectiveness, the rate would be increased to $3.07 by the addition of the Ex Parte No. 223 increase.

At the hearing, and again on brief, the respondents objected to the appearance, and the testimony of the witnesses, in behalf of the protestants other than the New York Central. They argue that the protests are not a part of the record, that these protestants are not proper parties to this proceeding, and that they have not shown sufficient interest to intervene. The appearances of the protestants thus mentioned were duly entered of record, and they were entitled to submit evidence pertinent to the issues in the proceeding.

The rates on bituminous coal from Indiana, Illinois, and western Kentucky to the Chicago area are on an origin group and differential basis. The rate structure described in *Fine Coal from Midwestern Mines to Chicago*, 298 I.C.C. 37, as modified in *Coal from Ill., Ind., and Ky. to Illinois*

[1] Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons (MC-120586).

[2] Rates are stated per net ton.

and Indiana, 308 I.C.C. 673, is the basis for the present rates. As subsequently increased through Ex Parte No. 223, the rates maintained by the railroads from the Princeton group to Chicago are $3.57 in single carloads and $3.07, minimum 1,000 tons. Lynnville is in the Princeton group; it is served by the New York Central, which has a fairly direct route to Chicago. However, to protect its long haul, that road will not participate in joint rates or routes with other carriers in the movement of coal from Lynnville to Chicago.

The proposed rate, which is the same as the all-rail rate, minimum 1,000 tons, would apply from Lynnville over the motor route of Floyd N. Lemmons to Haubstadt, Ind., thence the Chicago & Eastern Illinois to destination. The respective motor and rail distances over this route are not revealed. The motor carrier has a 95-cent intrastate rate on coal from Lynnville to Evansville, Ind., about 30 miles, but has neither interstate nor intrastate rates from Lynnville to Haubstadt. The respondents herein have not previously transported coal over any route from Lynnville to Chicago, and so far as appears the Chicago & Eastern Illinois is not a party to any rate on coal over any route from Lynnville to the Chicago district. Thus, the proposed rate is an initial rate, and the burden of showing its unlawfulness rests upon the protestants.

Under the tariff provisions, the proposed rate would apply on bituminous coal tendered at one time, on one bill of lading, by one consignor for delivery to one consignee at one destination, subject to a minimum of 1,000 tons per shipment. The protestants claim that this does not require the shipment of 1,000 tons at one time, but that the shipment may be tendered but not actually shipped on one day. The mine, which operates in two shifts about 15 hours a day, has two 700-ton tipples where it is said a

1,000-ton tender can be made. About 22 tons can be loaded on a truck. The actual loading of the truck is performed in about 2 minutes by the driver's operation of a loading device, after which the scale weight is determined. The motor carrier expects to use 5 vehicles in double shifts, or 8 to 10 vehicles in single shifts, each vehicle making 5 round trips a shift between the mine and Haubstadt. At the latter point the coal would be handled through facilities which were being built at the time of the hearing by the Chicago & Eastern Illinois for about $130,000, and rented to the motor carrier for 2 cents a ton.

When coal is loaded into rail cars, it is possible on some mine sidings to load sufficient cars to accumulate 1,000 tons of coal at one time. It seems to us reasonable to construe the words "at one time" as meaning a period of not more than 1 calendar day. According to the record, it would be practicable for the respondent motor carrier to transport the proposed minimum of 1,000 tons in that period.

Reconsignment privileges at Chicago permit free reconsignment of cars at destination, which it is urged authorizes delivery of cars at more than one spur or delivery point within the Chicago area. The term "destination" used in the tariff is broad enough to permit delivery at more than one location within a terminal area. Several large users of coal in Chicago do have more than one delivery location. However, delivery at more than one location in the same switching district would destroy the character of a volume rate. *Iron or Steel Plate or Sheet, Illinois to La Crosse*, 311 I.C.C. 81, 95.

Chicago is an important market for coal. During 1959, it received about 6 million tons from origins in Indiana, Illinois, and western Kentucky. Coal is an important segment of the protestants' traffic; for example, in that year six of them handled 198,974,794 tons, which was 27.4 per-

cent of their carload tonnage, and produced about 5.6 percent of their revenue from all carload traffic. The coal traffic constitutes 38.9 percent of the New York Central's total traffic and accounts for 18.7 percent of its revenue.

Coal from Indiana, Illinois, and western Kentucky mines in the midwestern field moves to points of consumption by rail, rail-barge, motor-barge and to some extent by motor. The volume by motor carriers is mostly for short distances and is increasing. Where production has been sufficiently large to justify the expenditure, the railroads have constructed spurs to off-rail mines. There are many mines which do not have rail service and must use either privately owned motor vehicles or local motor carriers to move the coal to the railhead. However, the coal here sought to be attracted by the respondents is not of that type. It is produced at mines served by the New York Central and now moves over that road. The New York Central originated 1,315,000 tons of coal at Lynnville in the first 10 months of 1960. By the instant proposal the respondents hope to divert about 200,000 tons of that traffic annually. If the proposed rate were approved, the evidence indicates that the New York Central would reduce its rate to prevent loss of the traffic; also, similar joint motor-rail arrangements could be expected to be made from other midwestern mines to the same and other destinations.

It has long been the practice of mines to bear the burden of transporting their coal to the railroads, and this encourages the delivery of the coal to the nearest railhead and maximizes net rail revenues. This practice has heretofore been respected by rail carriers generally. Reference is made to numerous mines in the midwestern field served by particular railroads which are only short highway distances from competing roads. Approval of the proposed rate, the protestants fear, would force midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads and

absorb most or all of the cost of transporting the coal to the railhead. Moreover, to avoid unlawful discrimination, like arrangements would probably be required also from numerous off-rail mines. Ultimately, they fear, this might result in breaking down the present just and reasonable midwestern coal-rate adjustment.

The cross-hauling of coal by motor carriers to facilities of competing rail lines would entail additional services at the same group rates which are not presently performed. The divisions to the motor carriers of such joint rates would reduce the rail revenues and increase the cost of rendering the service. Coal is a relatively low-priced, heavy-loading commodity, and rail rates thereon are generally maintained at a low level in relation to the cost of performing the service. If the railroads were forced by competition to enter into joint motor-rail rates, thus increasing their transportation costs, with reductions in their revenues for this important segment of traffic, the results could be unnecessary dissipation of carrier revenues and serious disturbance of a just and reasonable rate adjustment, in contravention of the national transportation policy.

For the foregoing reasons, we find that the proposed schedules constitute a destructive competitive practice, and are unjust and unreasonable. An order will be entered requiring their cancellation and discontinuing the proceeding.

COMMISSIONER FREAS, dissenting in part:

I agree with the conclusions that this is an initial rate and that delivery at more than one location in the same switching district would destroy the character of the volume rate. However, in the absence of convincing cost evidence or rate comparisons I find no support for holding that the proposed rates are shown to constitute a destructive competitive practice or to be unjust and unreasonable.

APPENDIX C

Pertinent Statutes from the Interstate Commerce Act

Section 15a [49 U.S.C. §15a] (1) When used in this section the term "rates" means rates, fares, and charges and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other fact is, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

• • •

Section 216 [49 U.S.C. §316].

• • •

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other

formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule regulation, or practice, shall go into effect at the end of such period: *Provided*, That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

* * * *

(i) In the exercise of its power to prescribe just and reasonable rate, fare, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

• • •

APPENDIX D

Excerpt from: Fine Coal from Midwestern Mines to Chicago

The group II parties consist of the eastern railroads and the other principal midwestern railroads, including the Illinois Central Railroad Company, the Louisville and Nashville Railroad Company, the Chicago & Eastern Illinois Railroad Company, the Missouri Pacific, The Pennsylvania Railroad Company, and The New York Central Railroad Company, which reduced the rates from the midwestern groups served by them solely to meet the reductions of the Burlington and to maintain origin relationships. They are petitioning carriers in No. 31731, and contend that all of the reduced rail rates from the midwestern field to the Chicago area are unlawful.

They show that these reduced rates, based on 1954 tonnage, will result in a loss of revenue on interstate traffic of $3,583,764, on Illinois intrastate traffic of $773,349, and on Indiana intrastate traffic of $35,241, or a total of $4,392,354 annually, and are convinced that there is no prospect of attracting additional tonnage sufficient to offset such losses. They show also that the midwestern railroad could have lost as much as 1,350,822 tons to the barge routes under the prior rates before their gross revenues would have been reduced to the extent of their reduction under the present rates. They contend that they could have lost as much as 2,225,000 tons to the barge routes before their net revenues would have been reduced as much as they will be under the present rates, and that to equal their net revenues on this traffic prior to the reduction in rates, they would have to obtain 3.7 million additional tons at the present reduced rates. It is asserted that these drastic reductions in the rates from the midwestern field to the Chicago area could not possibly be maintained without some reduction to intermediate and related destinations and from the east to the Chicago area, which would have a further adverse effect upon railroad revenues.

298 I.C.C. 37, at pp. 42, 43

APPENDIX E

COMPARISON OF INTERVENORS' BITUMINOUS COAL TONNAGE AND REVENUE WITH ALL CARLOAD FREIGHT TONNAGE AND REVENUE FOR THE YEAR 1959[1]

	TONS			REVENUE		
	Bituminous Coal	All Carload Freight	Percentage[2] Which Coal Is Of Total	Bituminous Coal	All Carload Freight	Percentage[3] Which Coal Is Of Total
	(1)	(2)	(3)	(4)	(5)	(6)
NKP	12,501,194	41,102,700	30.415	$ 21,516,051	$ 152,429,637	14.115
B&O	44,379,856	100,026,542	44.368	98,970,531	358,683,245	27.593
CMStP&P	5,444,866	40,025,972	13.613	11,284,028	208,271,529	5.418
PRR	55,440,189	163,199,138	33.971	116,343,584	683,399,287	17.024
NYC	51,250,859	131,511,847	38.971	99,227,483	529,746,008	18.731
IC	29,957,831	69,385,656	43.176	43,188,796	236,440,916	18.266
	198,974,795	545,251,675	36.492	$390,530,473	$2,168,970,622	18.005

SOURCE: I.C.C. Statement No. 60100

[1] From Witness Gobrecht's Exhibit No. 1.

[2] Column (1) divided by Column (2).

[3] Column (4) divided by Column (5).

APPENDIX F

Excerpt from Federal Register Volume 19 pp. 3509, 3520

INTERSTATE COMMERCE COMMISSION

[49 CFR Part 141]

MODIFICATION OF CERTAIN RULES TO GOVERN THE CONSTRUCTION AND FILING OF TARIFFS OF RATES FOR THE TRANSPORTATION OF FREIGHT BY RAILROAD, BY WATER, BY PIPE-LINE, AND JOINTLY BY RAIL-MOTOR, MOTOR-WATER, AND RAIL-MOTOR-WATER NOTICE OF PROPOSED RULE MAKING

JUNE 1, 1954

These rules are proposed in accordance with the provisions of section 4 (a) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1003) and under authority of sections 6, 217, and 306 of the Interstate Commerce Act.

• • •

53. Cancel present Rule 31 (§ 141.31).

EXPLANATION: Joint rates of motor carriers with rail or water carriers being expressly authorized by statute, it is doubtful if proportional rates by Part I carriers conditioned upon a prior or subsequent movement by motor carrier can be generally prohibited.

APPPENDIX G

Rule §1.19 of the Commission's General Rules of Practice

§1.19 *Pleadings part of record.* Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counter-pleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material.

Excerpt from Reply of Protestants to Petition for Reconsideration of, and Vacation of, Order of Suspension

Making statements, apparently based on conjecture, that the rate was suspended solely because it was found to be noncompensatory petitioners endeavor to show by complicated and not fully explained calculations that the rate exceeds out-of-pocket costs. Respondents calculate the rail out-of-pocket cost at $1.9487 (Petition p. 6) and the truck costs at $.549 (Petition p. 10) for a total of $2.49 per ton as compared with the suspended rate of $3.00 per ton. Protestants submit that the respondents' calculations grossly understate the costs and believe that the rate is noncompensatory. The cost issue should be fully inquired into at the hearing. Respondents sketchy, unsubstantiated cost calculations do not provide a trustworthy indication that the rate is compensatory. Moreover, even if the rate did exceed out-of-pocket costs by a small margin that fact alone would not prove that the rate is reasonably compensatory. As the compensatory issue is but one aspect of the reasonableness and lawfulness of the rate the thrust of the petition is insufficient to justify vacation of suspension. (Reply to Petition pp. 2-3)

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 360

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND FLOYD N. LEMMONS, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Appellants seek review of the final judgment of a three-judge district court dismissing their suit to set aside the cancellation by the Interstate Commerce Commission of their proposed joint motor-rail rates on bituminous coal from Lynnville, Indiana, to Chicago, Illinois. The district court sustained the Commission's finding that the proposed joint rate was un-

just and unreasonable, and constituted a destructive competitive practice, under Section 216(e) of the Interstate Commerce Act, 49 U.S.C. 316(e), and the National Transportation Policy, 49 U.S.C. preceding Section 1.

Rail rates from the midwestern coal field to Chicago are on a group and differential basis prescribed in *Fine Coal From Midwestern Mines to Chicago*, 298 I.C.C. 37, and *Coal From Illinois, Indiana, and Kentucky to Illinois and Indiana*, 308 I.C.C. 673. The Princeton group, which includes Lynnville, is one of about fifteen groupings of origin points, each with common rates, and its rates are related in a fixed pattern to those of other origin groups. Appellants' proposed joint rate of $3.07 is equal to the all-rail rate from Lynnville and other points within the Princeton group (J.S. 13a). However, the proposed rate covers the performance of a seventeen-mile truck haul of the coal from the mines at Lynnville to appellant railroad's line at Haubstadt, Indiana (also within the Princeton group); the transfer there of the coal into rail hopper cars; and the line-haul transportation of the coal to Chicago (J.S. 13a–14a). The Commission found that, under the existing all-rail rates, the cost of any truck haul between the mine and the railhead is borne by the shipper (J.S. 16a). Similarly, under the all-rail rates the shipper is responsible for the transfer of the coal into the rail cars following the truck movement (Tr. 14, 27, 44). The all-rail rate was fixed on the basis of this division of responsibility and does not contemplate the performance of any trucking or transfer services (Tr. 14). Thus the proposed rate would relieve coal shippers of these truck-

ing and transfer burdens and shift them to appellant railroad at no increase in the rate (which presently covers only the line-haul by rail). Appellant railroad would provide these services through the device of a joint rate, although appellant motor carrier would actually perform them, receiving therefor a division of the joint rate (J.S. 13a–14a). Remaining for appellant railroad under the proposed rate would be its division ($2.39) for the line-haul from Haubstadt to Chicago, for which it normally receives the full all-rail Princeton-group rate of $3.07. As the Commission found, the proposed rate merely "would entail additional services at the same group rates" (J.S. 16a).

The Commission found further that, if it were to approve appellants' proposed rate, the anti-discrimination provisions of the Interstate Commerce Act, 49 U.S.C. 2, 3(1), would require the reduction of the all-rail rate from Haubstadt to the level of appellant railroad's division of the proposed joint rate; otherwise, there would be different rates for Lynnville and Haubstadt shippers for performance of the same line-haul service from Haubstadt (J.S. 16a). Preservation of a balanced rate structure would then require a similar reduction in the all-rail rate from Lynnville, leaving the rate pattern exactly as it now exists but at a lower level (*ibid.*). Moreover, the Commission found, a similar downward spiral would be caused by consequent reductions in the all-rail rate from Lynnville and by the consequent initiation of joint motor-rail rates by other railroads in the area, such as intervenor New York Central, which

provides all-rail service between Lynnville and Chicago (*ibid.*). The net effect, the Commission concluded, would be the dislocation of a complex and finely balanced just and reasonable group-differential rate structure and the dissipation of needed railroad revenues with neither an increase in total rail traffic nor any change in the allocation of traffic among the carriers.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The reasonableness of the existing rate structure and the destructiveness of the proposed change are matters peculiarly for the Commission. *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593; *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83. Since, as the district court found, the Commission's findings were supported by substantial evidence, there appears to be no occasion for plenary consideration of the case by a second reviewing court.

1. Despite appellants' suggestion (J.S. 15), the Commission's estimate of the effect of the proposed rate upon the existing rate structure was not sheer speculation. The court below found (J.S. 8a) substantial evidence to support the Commission's prognosis that reductions in the all-rail rate from Lynnville would ensue (*e.g.*, Tr. 17–18) and that other carriers would be constrained to initiate similar joint rates (*e. g.*, Tr. 42, 65). Similarly the court found warrant in the record (*e.g.*, Tr. 12, 15–16, 65–66, 85) for the Commission's finding that approval of the proposed rate would reduce to an unreasonably low level

the rates for coal from the midwestern field to Chicago (J.S. 8a). No further review of the evidentiary basis for the Commission's order is required. *Radio Corp.* v. *United States,* 341 U.S. 412, 420; cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

2. The Commission cancelled appellants' proposed rate under the requirement of Section 216(c), 49 U.S.C. 316(c), that joint rates be reasonable, as well as in compliance with the prohibition in the National Transportation Policy, 49 U.S.C. preceding Section 1, against destructive competitive practices. Contrary to appellants' suggestion (J.S. 15), a finding of unreasonableness is not precluded by the compensatory nature of a rate. *New York* v. *United States,* 331 U.S. 284, 328. The relationship of the proposed rate to other rates and the avoidance of serious disparity are vital elements of the Commission's task. *Ibid.* Moreover, the National Transportation Policy is a specific command governing the administration of the entire Interstate Commerce Act, and prohibits the approval of any rate which constitutes a destructive competitive practice, whether or not reasonable from the standpoint of cost alone. *Eastern-Central Motor Carriers Ass'n* v. *United States,* 321 U.S. 194, 207; *Schaffer Transportation Co.* v. *United States, supra,* 355 U.S. at 87–88. Nor is the Commission required to stay its hand until the final stages of a wasteful and injurious rate war have precipitated rates to a disastrously low level (see *Jefferson Island Salt Mining Co.* v. *United States,* 6 F. 2d 315, 318 (N.D. Ohio); *New York* v. *United States, supra,* 331 U.S. at 345–346). Hence

the Commission properly cancelled the proposed rate. It was not required, in view of the permissive language of Section 216(g), to prescribe another rate in its stead. Section 216(g), 49 U.S.C. 316(g); *Contract Rates, Rugs and Carpeting from Amsterdam, New York*, 313 I.C.C. 247, 254, affirmed, *New York Central R. Co. v. United States*, 194 F. Supp. 947 (S.D.N.Y.), affirmed *per curiam*, 368 U.S. 349; *Facing or Flooring Tile—Malone Freight Lines, Inc.*, 68 M.C.C. 211, 214, affirmed, *Malone Freight Lines, Inc. v. United States*, 159 F. Supp. 952 (N.D. Ala.).

3. The orders of the Commission in no way impede the establishment and maintenance of joint motor-rail rates that are reasonable and nondestructive. The Commission has long advocated that railroads and motor carriers establish reasonable through routes and joint rates, *Coordination of Motor Transportation*, 182 I.C.C. 263, 387; *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 747–48, and in its latest report to Congress the Commission recommended that Section 216(c) of the Act be amended to enable it to *require* railroads and certificated motor carriers to establish reasonable through routes and joint rates. *75th Annual Report of the Interstate Commerce Commission*, p. 186 (1961). Furthermore, the restrictions cited by appellants (J.S. 12) against the railroads' publication of proportional rates in connection with through routes with motor carriers, 49 C.F.R. § 141.31, were cancelled effective November 15, 1956 by Supplement 8, Tariff Circular No. 20, for the reason that "Joint rates of motor carriers with rail or water carriers be-

ing expressly authorized by statute, it is doubtful if proportional rates by Part I carriers conditioned upon a prior or subsequent movement by motor carrier can be generally prohibited" (Notice of Proposed Rule Making, 19 Fed. Reg. 3509, 3520).

4. Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3),[1] by its terms is inapplicable in a rate dispute which was essentially *intra*-modal, that is, between appellant railroad and the other railroads in the area. As the lower court found (J.S. 8a–9a):

> "The requirement of section 15a(3) of the Interstate Commerce Act that the Commission not hold up the rate of one mode of transportation to protect the traffic of another mode is inapplicable where, as herein, one railroad, albeit under a proposed joint rate with a motor carrier, is seeking to provide additional services than are provided by other railroads, though at the same rate. 49 U.S.C. § 15a(3); cf. New York, N.H. & H.R. Co. v. United States, 199 F. Supp. 635 (D. Conn. 1961); Missouri Pacific R. Co. v. United States,—— F. Supp. —— (E.D. Mo. 1962). The Commission was justified in considering the sub-

[1] Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3), provides:

"*In a proceeding involving competition between carriers of* different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

stance of the service proposed to be performed rather than the form of the rate alone; that is, the publication of the joint rate did not prevent the Commission from considering the intramodal competitive situation involved. See Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245, 271 (1936).

Where, as here, the line-haul movement of the coal traffic will be accomplished by rail under both the existing all-rail rates and the joint motor-rail rates at issue, the joint motor-rail transportation may not properly be regarded as a separate and distinct mode of transportation. Moreover, the Commission plainly did not hold up the rates of one mode of transportation "to a particular level to protect the traffic of any other mode of transportation." Rather, it disapproved the rate proposal here to prevent the unnecessary dissipation of the revenues of all rail carriers through the disruption of the existing just and reasonable coal-rate structure.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration and the judgment of the court below should be affirmed.

Respectfully submitted.

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No. 360

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

and

FLOYD N. LEMMONS,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY TO MOTIONS TO AFFIRM.

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REPLY TO MOTIONS TO AFFIRM.

The Motions Themselves Demonstrate That the Issues Require Plenary Consideration.

Even the most casual reading of the respective motions of the Government and the appellee railroads leads to the conclusion that resolution of the issues raised by this appeal require plenary consideration by this Court. Government counsel, apparently of the view that the paucity,

generality and vagueness of the Commission's findings do not afford a substantial basis for defense of the Commission's order, have undertaken to attribute to the Commission's report findings which it did not make, and to attempt to particularize and apply to the proposed joint motor-rail rate those general findings of the Commission as to what other railroads *might* do, or what other railroads fear *might* happen, in *their* transportation of coal from the involved area.

Government counsel also failed to discuss several of the issues, including the contention of appellants that the concerted refusal of appellee railroads to enter into joint arrangements with motor carriers, to which the Commission did not refer in its report, constitutes a destructive competitive practice which the Commission's order would perpetuate.

Appellee railroads made little reference to the Commission's findings. Rather, they largely referred to the scanty evidence they introduced in the Commission's proceeding relating to the rate structure, and to the findings and conclusions proposed by counsel for the Commission and adopted by the district court. The court's findings and conclusions cannot, of course, be resorted to for the purpose of supplying deficiencies in the Commission's report. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 294 U.S. 499.

The Alleged Detrimental Effect on the Rate Structure.

The Commission's order is predicated on its finding that "if the railroads were forced by competition to enter into joint motor-rail rates . . . with reductions in their revenues . . . the results could be unnecessary dissipation of

carrier revenues and serious disturbance of a just and reasonable rate adjustment, in contravention of the National Transportation Policy" (J.S. 16a, 17a). The statement as to disturbance of the rate adjustment is a complete *non sequitur*, and contradicts the Commission's subordinate finding that the service under joint motor-rail rates would be performed "at the same group rates" (J.S. 16a).

The Commission's report deals, not with possible *rate* reductions, but with possible reductions in railroad *revenues* that it apparently believes might result from possible motor carrier participation in the transportation. Yet Government counsel, starting with alleged discrimination by the C&EI against a (non-existent) shipper at Haubstadt, fancifully trace an anticipated "downward spiral" in rates, terminating in "an unreasonably low level of rates", all of which they assert the Commission found in its report (motion, pages 3 and 4). Nowhere are there any such findings in the Commission's report, and, contrary to the assertions of the Government, at no place in the findings and conclusions made by the district court is there any reference to any such findings.

The anticipated "downward spiral" in rates would be precipitated, according to Government counsel, (and they boldly assert that the Commission so found), by a required reduction in the C&IE's all-rail rate from Haubstadt, to avoid discrimination against Haubstadt shippers (motion, page 3). But the Commission could not possibly have made this finding, for the simple reason that there is no coal mine at Haubstadt. Even if there were a coal mine located there, neither Section 2 nor Section 3(1) of the Interstate Commerce Act would require that the all-rail rate from Haubstadt be on the same level as the

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C&EI's division of the proposed rate, because under an all-rail rate from Haubstadt the C&EI would be performing extensive mine and train switching services there and supplying cars partly on a rent-free basis, costly services which the C&EI would not perform under the proposed rate from Lynnville. *Cf. State of New York* v. *United States*, 331 U.S. 284, 305.

What the Commission actually found regarding possible discrimination was that *if the fears* of appellee railroads that approval of the proposed rate were to force "midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads" were to materialize, "to avoid unlawful discrimination, like arrangements would probably be required also from numerous off-rail mines" (J.S. 16a). The finding ignores the rule that discrimination can be practiced only by a carrier serving, in single-line or joint-line service, the point allegedly favored and the point allegedly prejudiced.[1] And the Commission cannot compel joint motor-rail rates (Gov't. motion, P. 6; 75th Annual Rpt. of the Commission, P. 186). Also, the Commission, in approving *proposed* rates, has held that it "cannot conclude, from an allegation of those who are neither shippers nor receivers, that undue prejudice exists merely because a service provided at one point is not extended to other points" served by the same carrier. *Motor-Rail-Motor Traffic in East and Midwest*, 219 ICC 245, 269. This principle has even stronger application to the instant case, since the "midwestern railroads generally" have not proposed any joint motor-rail rates on coal, and the prospects that they will do so are built on highly speculative hypothesis.

The doctrine enunciated by the Commission in *Motor-Rail-Motor Traffic*, above, is in accord with the teaching

[1] Cf. New York Central RR. Co. v. United States, 207 F. Supp. 483, 489 (S.D.N.Y., 1962).

of this Court that "because opportunities for the violation of the Act may occur by reason of the [rate, rule, practice] is no ground for holding that . . . the [rate, rule, practice] is illegal". *Southern Pacific Company* v. *Interstate Commerce Commission*, 200 U.S. 536.

Ayrshire Collieries Corporation v. *United States*, 335 U.S. 573, relied on by appellees, clearly is inapplicable, since it involved discrimination as between shippers and receivers of coal caused by the fact that proponents' single-line rates were lower than the joint-line rates in which proponents participated. But here the proposed rate is identical to the all-rail rate and for the same services, and therefore cannot discriminate against any shipper or receiver, *nor did the Commission find that it would.* The only statement in the Commission's report as to a possible rate reduction is a reference to a possible reduction in the New York Central's rate from Lynnville (J.S. 16a). But even if this possibility were to become a reality, it would not necessarily disrupt the rate structure. As this Court said in setting aside a rate order of the Commission in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 294 U.S. 499, 507:

> "Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the rate structure theretofore prevailing. Plainly such a disruption without more is not sufficient reason for prohibiting a change . . ."

Such reduction would be "subject to the power of the Commission, which may keep the changes within bounds". *Chicago, Milwaukee case, supra* (294 U.S. 499, 509).

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[2] For a recent application of the Chicago, Milwaukee doctrine to the Commission's "fear about a rate war", see New York Central RR Co. v. United States, 207 F. Supp. 483, 497 (S.D.N.Y., 1962).

The "Additional Services" Allegedly Rendered under the Proposed Joint Motor-Rail Rate.

Contrary to the Government's statement (pages 2 and 3), the Commission did not find that the *proposed rate* would relieve shippers of trucking and transfer burdens and shift them to appellant railroad, or that the *proposed rate* would entail additional services at the same group rates. The Commission merely made the general finding that the cross-haul of coal by motor carriers to facilities of "competing" rail lines would entail additional services at the same group rates (J.S. 16a); there is absolutely no finding that there will be any cross-hauling under the proposed rate. The Commission could not have made this latter finding, because the motor-rail route is 22.7 miles shorter than the all-rail route of the New York Central and 25.5 miles shorter than the all-rail route of the Southern Railroad—Chicago & Eastern Illinois Railroad. (Reply to Protest, not denied or rebutted by Protestants).

As for the allegation by Government counsel that the loading or transfer burden will be shifted from the mine operator to appellant C&EI, the Commission made no such finding. The mine operator at Lynnville will continue to load the coal, and he will pay the equivalent of the all-rail rate for the transportation to Chicago, which includes the haul by motor carrier from Lynnville to Haubstadt. Therefore, even if the mine operator at Lynnville were not located on a line of railroad and had been trucking his coal to Haubstadt, he would, under the proposed rate, merely be substituting regulated motor carriage for private motor carriage.

The line-haul service that would be performed by appellant Lemmons between Lynnville and Haubstadt would replace the line-haul service presently performed by the Southern Railroad between Lynnville and Evansville. If

any additional service were required there would be an additional charge therefor (Tr. 101, 102). The services to be performed under the proposed rate are indistinguishable in principle from trailer-on-flat-car services in which motor common carriers perform all services to and from the railheads. Many such joint arrangements have been approved by the Commission.

In fact, the services performed under the joint motor-rail rate would be much less extensive than those performed under the all-rail rate, as indicated by the increasing popularity of trailer-on-flat car service, so ardently espoused by the railroad industry. That the all-rail services are much more costly is attested by the fact that such service requires extensive switching and prolonged rent-free detention of coal cars at the mine, costly services which would not be performed under the motor-rail rate.

Moreover, regarding the "additional services" that allegedly would be rendered by other railroads to off-rail mines, there is no evidence in the record that there are any off-rail mines in Indiana.

The Proposed Service Will Not Result in Cross-Hauling and the Rendition of Additional Services by Other Railroads.

The uncontroverted evidence of record is to the effect that the only motor common carrier with operating rights from any mine in the involved area is applicant Lemmons, whose authority is restricted to a radius of forty-five miles from Booneville, Indiana. Therefore, the *fears* of the appellant railroads, as expressed in the Commission's report (J.S. 16a), that approval of the proposed rate would "force midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads" (J.S. 16a) have little basis in reality and are a completely nebulous predicate for the Commission's order.

The Alleged Reduction in Rail Revenues.

Evidence as to only two all-rail routes was introduced in the proceeding, namely, the New York Central route and the Southern-C&EI route. That evidence encompassed the circuity of the all-rail routes; the practice of "no billing" (prolonged rent-free detention of cars at the mine); costly switching operations at the mine; in the case of the Southern-C&EI route, interchange at Evansville; and in the case of the New York Central route, at least four intermediate switching services enroute to Chicago (Reply to protest, and again in petition for reconsideration, not denied or rebutted). The foregoing evidence was ignored by the Commission in its finding relating to possible diminution of "revenues of railroads generally." For all that appears of record, joint motor-rail rates on coal would enhance *net* rail revenues.

The Proposed Rate Will Not Result in Diversion of Coal Traffic from Other Railroads.

Appellant Lemmons presently transports coal from the mine at Lynnville to Evansville (J.S. 14; Tr. 93). Operation under the proposed rate would require maximum utilization of the truck loading facility at the Lynnville mine and of Lemmons' equipment (J.S. 14a). Therefore, he would merely be substituting an operation to Haubstadt for his present operation to Evansville.

Since Lemmons is the only motor carrier serving Lynnville, it is reasonable to expect that the coal which he presently hauls to Evansville will move to Evansville over the rails of the Southern Railroad or the New York Central. There could therefore not possibly be any diversion of coal tonnage from the rails. The only controversy therefore is which railroad or railroads will move the

traffic, and this, it is submitted, is the basis of the New York Central's complaint.

Appellant Railroad Would Benefit from Approval of the Proposed Rate.

Contrary to the implication made by appellee railroads (motion, page 9), appellant C&EI would benefit from approval of the proposed rate. The C&EI would receive $2.32 per ton as its division of revenues under the proposed rate, whereas its present division of revenues under the Southern-C&EI joint rate is $1.89 per ton for a 17.5 mile longer haul. (Reply to Protest, not denied or rebutted). The C&EI would also be relieved of the burden of costly switching services at its junction with the Southern at Evansville. (*Idem.*) Appellee railroads can find little solace in the three cases[3] cited for the proposition that the Commission has protected all parties in acting to preserve the said rate structure (motion, page 9). In each of the cited cases the Commission issued an order which it felt was designed to preserve a rate structure and in each case the Commission's order was set aside, in rather forceful language, by a three-judge Court.

The Concerted Refusal of Appellee Railroads to Enter into Joint Competitive Rates with Motor Carriers Is a Destructive Competitive Practice, Which the Commission Should Have Considered.

The Commission made no reference in its report to the testimony of a railroad witness that railroads in Central

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[3] **New York, New Haven & Hartford Railroad Company v. United States,** 199 F. Supp. 635 (D. Conn., 1961); **Missouri Pacific Railroad Company v. United States,** 203 F. Supp. 629 (E.D. Mo., E.D. 196_ ; **St. Louis-San Francisco Railroad Company v. United States,** ..... F. Supp. ..... (Civil No. 61 C 309 (1) E.D. Mo 1962, not printed).

Territory "very frequently in the recent past" have discussed the "feasibility" of entering into joint rates on coal with motor carriers, and had decided against doing so, in order to protect their revenues (Tr. 45). Yet the Commission's order would perpetuate the effects of this concerted action.

Contrary to the contention of appellee railroads, the Interstate Commerce Commission is a proper forum in which to allege this violation of the antitrust laws (Sherman Act, 15 U.S.C. §1). *New York Central Railroad Company* v. *United States, et al.*, 194 F. Supp. 947 (S.D.N.Y., 1961), motion to affirm granted, *New York Central Railroad Company* v. *United States, et al*, 368 U.S. 349. The three-judge district court in the *New York Central* case, in construing the "destructive competitive practices" provision of the National Transportation Policy, referred to earlier enactments of antitrust legislation for "an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission . . . to decline to countenance" (194 F. Supp. at 951). Cf. *McLean Trucking Company* v. *United States*, 321 U.S. 67, 86-87, and *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481.

None of the antitrust statutes referred to by the district court in the *New York Central* case prohibits any type of practice similar to the promulgation of a joint motor-rail rate identical to the all-rail rate. On the other hand, the railroads' boycott of motor carriers is a *per se* violation of the antitrust laws, not requiring proof of public injury. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207.

The Commission, in its report in the instant case, has ignored the teaching of *McLean Trucking Company* v.

United States, 321 U.S. 67, 86-87, that the Commission should not "ignore" the policy underlying the anti-trust laws, since "[t]he preservation of independent and competing * * * carriers unquestionably has bearing on the achievement of those ends" of the national transportation policy.

The Government is silent on this point, and understandably so, in view of its statement in its motion to affirm the judgment of the district court in the *New York Central* case, 194 F. Supp. 947, that "the Commission and the Court below correctly held that reference to the anti-trust laws is appropriate in determining whether a practice is 'unfair or destructive' to competition" (motion to affirm, page 9, in No. 482, October term, 1961, *The New York Central Railroad Company* v. *United States, et al.*

The Commission Did Not Predicate Its Order on Any Substantive Provision of Law.

Both groups of appellees argue that Section 216(*e*) of the Interstate Commerce Act, 49 U.S.C. Section 316(e), requires that the joint rates be just and reasonable. However, neither group asserts that the Commission predicated its order on said section. The Commission did not refer in its report to any substantive provision, nor could it have done so, for all of its findings relate to remotely possible "destructive competitive practices" that might be engaged in by other railroads.

The Government emphasizes that it is the Commission's "task" to maintain "the relationship of the proposed rate to other rates and the avoidance of serious disparity" (motion, page 5). But there is no disparity between the proposed rate and other rates, nor did the

Commission find that there is. Significantly, *State of New York* v. *United States*, 331 U.S. 284, cited by the Government, did not involve "destructive competitive practices" under the National Transportation Policy, and the Commission in its report therein made findings under, and referred to, the substantive provisions found to have been violated. In *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S. 194, also cited by the Government, it merely was held that savings in costs are not the only criteria for judging the lawfulness of a proposed volume rate, and that the Commission had erroneously failed to consider the National Transportation Policy and had inadequately explained the basis of its action.

The Commission's Report and Order Prohibit Joint Motor-Rail Rates on Coal Traffic.

The captioned proposition is inherent in the Commission's findings that "the divisions to the motor carriers of such joint rates would reduce the revenues of the railroads" and that "if the railroads were forced by competition to enter into joint motor-rail rates, . . . the results could be . . . serious disturbance of a just and reasonable rate structure, in contravention of the National Transportation Policy" (J.S. 16a, 17a). Section 217(a) of the Interstate Commerce Act, 49 U.S.C. Section 317(a), expressly requires the publication of joint rates when through routes are established with a railroad. Therefore, motor carriers are also prohibited from entering into proportional rates on coal traffic handled by railroads and, further, are prohibited by the Commission's order from joint participation in such transportation. The Commission's failure to prescribe what it might consider a lawful rate irrebuttably supports this conclusion.

The Commission Is Required to Make Findings under Section 15a(3).

The Government relies on the conclusion of the court below that the requirement of Section 15a(3) of the Interstate Commerce Act is inapplicable where a railroad, under a proposed joint rate with a motor carrier, "is seeking to provide additional services than are provided by other railroads, though at the same rate". Significantly, the Commission did not make the finding, attributed to it by the lower court, that appellant C&EI is seeking to provide additional services. The Commission made the general finding that the cross-hauling of coal by motor carriers to facilities of competing rail lines would entail additional services (J.S. 16a). The Commission could not find that appellant C&EI would be performing additional services under the proposed rate, because the services are the same as, or less than, those performed under the all-rail rate, and part of the services are performed by appellant Lemmons, for which he receives payment from the mine operator in the form of a division of revenues from the proposed rate.

The two cases[4] referred to by the court below do not stand for the proposition for which they were cited; they are authority for the proposition that motor-rail service and all-rail service are separate and distinct modes of transportation. In both cases, the Commission's orders were set aside for failure to observe the requirements of Section 15a(3), for applying the "destructive competitive practices" provision of the National Transportation Policy without regard to the substantive provisions of law which

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[4] **New York, New Haven and Hartford Railroad Company v. United States, 199 F. Supp. 635 (D. Conn., 1961); Missouri Pacific Railroad Company v. United States, 203 F. Supp. 629 (E.D. Mo., 1962).**

that policy merely qualifies, and for failing to consider under the National Transportation Policy the "inherent advantages" of the trailer-on-flat-car mode of transportation.

The Government and the court below ignore the fact that the proposed rate was published under the Motor Carrier Act, which authorizes joint motor-rail rates, and not under Part I of the Interstate Commerce Act, which provides for the regulation of railroads only. The Commission itself has held that "motor-rail-motor service differs substantially from all-rail service" even though the haul that a motor carrier might receive "would be short, or terminal in character." *Motor-Rail-Motor Traffic in the East and Midwest,* 219 ICC 245, 271, 273. Since the length of the motor-haul under the proposed rate is 16 miles, and is not terminal in character, it is difficult to perceive how appellants' proposed motor-rail service can be considered an all-rail service, resulting in an "intramodal competitive situation". Certainly there is nothing in the Commission's report that indicates such a rationalization.

Appellee railroads argue that the C&EI cannot be a railroad subject to the Interstate Commerce Act and simultaneously be another mode of transportation (motion, page 12). That the C&EI can be a component of two modes, depending upon the services performed, is quite obvious and has been established beyond any doubt. *New York, New Haven and Hartford Railroad Company* v. *United States,* 199 F. Supp. 635 (D. Conn., 1961).

The Commission Unlawfully Restricted the Application and Scope of the Second Proviso to Section 206(a) (1).

The Government remains silent on this point while appellee railroads assert that appellant Lemmons received the same treatment as any carrier possessing his operating authority regardless of how obtained (Motion, page 13). Lemmons has been deprived of the right to enter into a joint motor-rail rate on coal transported interstate over routes within the State of Indiana because the Commission feels that railroads should not be "forced by competition to enter into joint motor-rail rates" on coal (J.S. 16a). The fact that any other motor carrier would receive the same cavalier treatment as did appellant Lemmons does not justify the Commission's action.

Appellee railroads also advance the proposition, *not found* by the Commission in its report, and contrary to the evidence, that the all-rail route is more efficient than the proposed motor-rail route (motion, page 13). If such is the case, the mine operator will not use the proposed service, since the motor-rail rate is identical to the all-rail rate; *ergo,* railroads cannot possibly "be forced by competition to enter into joint rail rates", and the structure of the Commission's *rationale,* such as it is, collapses.

The Commission Cannot Cancel a Joint Motor-Rail without Prescribing the Lawful Rate or Lawful Minimum Rate.

Appellee railroads rely on conclusion of law No. 7 of the court below, which cites four sections of the Interstate Commerce Act as authority for the proposition that the Commission need not prescribe a lawful rate or lawful minimum rate when it finds an existing motor-rail rate unlawful. The Government relies exclusively on Section 216(g) of the Act. One of the sections of the Interstate

Commerce Act cited by the court is Section 216(e), 49 U.S.C. Section 316(e), which specifically provides that the Commission, when it finds a joint motor-rail rate unlawful, "shall prescribe" the lawful rate or lawful minimum rate. Cf. *Oil Field Haulers Association* v. *Acton*, 53 M.C.C. 507, 508.

The other sections cited by the lower court are inapplicable. Section 204(c), 49 U.S.C. Section 204(c), authorizes the Commission to issue appropriate orders to compel carriers or brokers to comply with the provisions of Part II of the Interstate Commerce Act. This section deals with the general powers and duties of the Commission, and must yield to the specific mandate of Section 216(e). In none of the reported rate cases has the Commission acted under Section 204(c). Moreover, the Commission's report and order herein did not require appellants to comply with any provision of Part II, nor did it even refer to any provision of said Part II.

Section 216(g), 49 U.S.C. § 316(g), also cited by the court and exclusively relied on by the Government, deals with the power of the Commission to suspend proposed rates for a period of 7 months, and provides that the Commission, after hearing, may make such a rate order as would be proper in a proceeding instituted after the rate had become effective. The Government says that Section 216(g) is permissive, and so it is. The Commission is permitted by Section 216(g) to issue an order with respect to a suspended rate. But in doing so, it is limited to the type of order that would be proper in a proceeding in which the rate is not suspended. The only kind of an order which the Commission may make after a rate becomes effective is the type permitted by Section 216(e), which requires the prescription of a lawful rate

or lawful minimum rate, upon a finding that the existing rate is unlawful.

Section 217(a), 49 U.S.C. Section 217(a), requires the publishing, filing and posting of tariffs in such form and manner as the Commission may prescribe, and authorizes the Commission to reject any tariff which is not consonant with Section 217 or the Commission's regulations, whereupon the tariff shall be void. The section clearly is designed to assure public dissemination of tariff information, and has nothing to do with the power to cancel rates. The Commission did not reject the tariff containing the proposed rate; if it had, there would have been no hearing and no order concerning the proposed rate. In fact, the tariff is still on file in the Commission's offices.

The Commission's failure to prescribe what it might consider a lawful rate is consonant with the tenor of the Commission's report that joint motor-rail rates on coal are prohibited.

CONCLUSION.

The Commission's findings are so general, speculative, and illogical that Government counsel felt compelled to substitute their own findings and attribute them to the Commission. The Commission has outlawed joint-motor-rail rates on coal in the face of a Congressional policy favoring such arrangements, and it has done so on the basis of pyramided speculations. It has failed to give effect to, and to make findings under, the recently enacted and highly important Section 15a(3) and other provisions of the Interstate Commerce Act. Finally, it has, unless

its order is set aside, perpetuated a destructive competitive practice without making any findings with respect thereto. Obviously, the issues require plenary consideration by this Court.

Respectfully submitted,

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